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REPORTS

OF

SELECT CASES

DECIDED IN

THE COURT OF APPEALS

OF KENTUCKY,

DURING THE YEAR 1834.

BY JAMES G. DANA.



VOLUME II.

FRANKFORT, K.

PRINTED FOR THE REPORTER,

(AT HIS PRINTING OFFICE,)

1835.

Hawley
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v. 22

ENTERED, according to Act of Congress, in the year 1885,

BY JAMES G. DANA,

**In the Office of the Clerk of the District Court of the United States for the District of
Kentucky, in the Seventh Circuit.**

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JUDGES


OF

THE COURT OF APPEALS,

WHEN THE FOLLOWING CASES WERE DECIDED.

The Hon. GEORGE ROBERTSON, *Chief Justice of Kentucky.*

The Hon. JOSEPH R. UNDERWOOD, }
The Hon. SAMUEL S. NICHOLAS, } *Judges.*

 The cases reported in this volume, were selected by the Judges, under an Act of Assembly which directs that they shall permit the publication (under State patronage) of such cases only, as, in their opinion, "establish some new, or settle some doubtful point, or be otherwise by them deemed important to be reported."

DECISIONS
OF
THE COURT OF APPEALS
OF KENTUCKY
AT THE
SPRING TERM, 1834.

Dimmitt vs. Lashbrook.

EJECTMENT.

2d
137 258

[Messrs. Morehead and Brown for Appellant : Mr. Crittenden for Appellee.]

FROM THE CIRCUIT COURT FOR MASON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

April 8.

IN this case (ejectment,) the only question deemed by this court worthy of special consideration, is, whether, as the appellant contends, the circuit court erred in instructing the jury that, "where one corner of a survey (having had four corners) is lost, and it cannot be proved where the corner stood, the proper mode of fixing such corner is by pursuing the marked line of the original survey, leading to the place where such corner stood, and also retracing the marked boundary leading from the place where the corner stood, to the intersection of the two lines; and if, in consequence of the ground being cleared about the place where the corner

Question to be decided — upon the proper mode of ascertaining the corner of a survey, where, the ground having been cleared, the marks of the corner, and of the lines leading to it, are effaced.

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stood, the marked boundary, or lines of the original survey, cannot be traced all the way to such intersection, that then they are to be pursued as far as they still remain, and, from their termination at the cleared ground, are to be extended the general course of that part of the marked line still remaining, to the intersection of the next line."

The lines of a survey, as marked by the original surveyor, (in general conformity to the patent courses and distances,) must be taken as the true boundary—the whole distance, or so far as they can be discovered. If the lines were never marked, or have been effaced, and their actual position cannot be found—the patent courses (so far) must govern.—But, whether the lines were ever marked, and if so, where, are questions of fact, to be proved, and determined by a jury, and not mere deductions of law to be decided by the judge.

The record does not shew what facts appeared on the trial; but whatever they may have been, or whatever they may have conduced to prove as to the true position of so much of the line as cannot be now identified by actual demarcation, we are of the opinion that, in giving the foregoing instruction, the circuit judge assumed, as a matter of law, that which was purely a question of fact, for the sole consideration of the jury; and that, therefore, the instruction was, in that respect, improvident and erroneous.

Although it would be unreasonable to expect that any surveyor, however vigilant and skillful, could pursue, with mathematical precision, the exact course designated in an entry or patent, and, therefore, the line actually traced by him must, when sufficiently identified, be deemed the legal as well as actual boundary; nevertheless, when he shall not have marked the line, or when it cannot be identified though once marked, the patent course fixes the true constructive boundary. But whether the line was ever actually run or marked, and, if it were so designated, where it was, are not deductions of law or matters of construction, but are facts to be ascertained and settled by a jury, and a court should not, by construction, fix the line, if there be any proof whatever tending legitimately to shew, that it was actually run, and where. If, however, there be no proof as to its actual position, even though there be proof that it was once run and marked, the patent course must govern, and the court should so instruct the jury.

These fundamental positions not only accord with reason and propriety, but are well established by adjudged cases. In *Cowan et al. vs. Fauntleroy et ur.*, 2 Bibb, 262, this court said—"If, however, in making a survey, a line shall have been marked, as in the present

case, only a part of its distance, it would seem that the boundary of the survey, for the residue of the distance, should be ascertained by running a line as nearly direct as practicable from the termination of the marked line to the corner called for;" that is, when the corner is identified: but when the corner cannot be otherwise established than by construction, the line must be extended according to the patent course, unless there be some evidence that it was actually run variant from that course. Thus, in *Wishart vs. Cosby*, 1 *Marshall*, 383, this court said, that the court should have instructed the jury, "that, if they were of opinion, from the evidence, that the lines, or any part thereof, from the north east and south west corners, were extended variant from the patent course,—that, so far as those lines were, in their opinion, shewn to have been made, they must give boundary to the claim; and if they were of opinion those lines were not extended to the intersection, that the patent courses from the points where they are shewn to have existed, should be extended so as, by their intersection, to form the north western corner."

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1884.

Dimmitt
vs.
Lashbrook.

The following propositions are incontrovertibly true upon principle, reason and authority:—

1. When there is no evidence that a line was actually run by the surveyor, or as to where it was run, the patent course must, as a matter of necessity and of law, be deemed the boundary. 2. When a line was actually run, it must be, as so run, the true boundary. 3. Whether a line had been so run, and where it was run, are facts to be proved by witnesses, and ascertained by a jury, and are not mere deductions of law.

Tested by these criteria, the instruction we are considering cannot be maintained; for, if there was no testimony tending to shew that the entire line was actually run by the original surveyor, or where it was run, the course called for in the patent was the true and only constructive boundary; and if the proof, in any degree, tended to shew that the whole line had been run, whether it was so run, and where, were facts which the jury, and not the court, should have decided.

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1834.

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vs.

Lashbrook.

There is not, in our opinion, any thing (as the counsel for the appellant seems to suppose) in the case of *Thornberry vs. Churchill and wife*, 4 *Monroe*, 29, in the least degree incompatible with the principles we have herein recognised. In that case, the jury, upon what evidence the opinion does not shew, having established a line as far as it was identified by marks, and having continued it, after these failed, according to the course as defined by so much of it as was marked, this court sustained the verdict, because it was according to "*fact*" and "*law*," and because the line, as thus extended, was *more favorable to the complaining party than it would have been had the patent course been adopted*, and, therefore, he had no right to complain. But the court certainly did not decide that, *when a line had been run in part only*, it should be extended the whole distance (called for) on the general course of so much as had been marked; and even had such been the decision in that case, we could not regard it as authoritative, because it would not only be irreconcilable with reason, but contrary to an unbroken series of adjudications ever since the case of *Bryan &c. vs. Beckley*, in *Sneed* and in *Select Cases*. It is a self-evident proposition, that the calls of the patent must define the boundary, excepting so far, and only so far, as the lines actually made by the original surveyor deviated from those calls.

Nor does the opinion in 4 *Monroe* (*supra*) even intimate that, whether the line partially identified by marks had been actually extended its whole length, and how it had been extended, were questions of law, or of construction to be settled by the court, and not pure matters of fact, for the consideration of the jury. All that was decided in that case, so far as it can bear on this, was that the facts authorized the verdict, and that, of course, it was according to law. But the circuit court did not in that case, as in this, instruct the jury how to extend the line; and that case, properly considered, is rather an authority against the right to give such an instruction, and tends to shew that a jury may, in such a case, decide whether the whole line was run, and *where* it was run.

In *Bryan &c. vs. Beckley, Litt. Sel. Ca. 93*, this court said that, "nothing but necessity will justify a departure either from course or distance;" and in the same case, page 98-9, we find the following language:—"Visible and actual boundaries, as rules to govern the property of men, are far preferable to ideal lines and corners; but when these actual land marks fail, we must resort to the next best evidences—courses and distances—as producing a reasonable degree of certainty, and a necessary security against the acts of the fraudulent and depraved, and against time and the elements."

Nothing but the actual running of a line variant from the patent course and distance, can give any other boundary than that defined by the calls of the patent. Whether a line was actually run, and *how* and *where*, are evidently matters of fact, and not deductions of law; and policy and law certainly require that the patent calls should define the boundary, unless there be strong and satisfactory evidence shewing that an actual survey was made varying from those calls.

In this case, the court had no right to say that, because a part of a line was identified by actual marks, the whole line had been actually marked or traced by the original surveyor. Nor had it a right to decide, as a deduction of law, that, if the entire line had been marked, it was elongated in the *general course* of so much of the line as could still be identified by the actual marks. The proof might be such as to justify the inference, as a matter of fact, that the entire line had been run and marked; and even, also, to allow the like inference that the whole line, as run, corresponded, in all its parts, in its deflection from the patent course; but whether there was such a completion of the actual line, or such a uniformity of departure throughout the whole length of the line, would be more or less probable according to the facts proved. Is the line well marked from the corner to the cleared ground? Then it may be probable, especially if other lines are marked, that the whole of this line was originally marked. But otherwise such probability would be greatly diminished, perhaps altogether destroyed. What proportion in

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length does the line, as now marked, bear to the distance called for? And what is the general course of the line as marked? Is it rectilinear, or is it unusually erratic or zigzag? If the latter be the character of the marked line, then it is not only not probable, but is in fact improbable, that such irregularities as cannot be ascribed to a settled deviation of the compass, were *uniform* throughout the whole line from corner to corner. It is thus manifest, that the *law* cannot arbitrarily fix any other line than that which the patent prescribes, and that whether a jury should do so or not, must depend altogether on the character of the proof tending to shew an actual line different from the patent course.

As the proofs are not all exhibited in this record, this court could not decide whether they would have sustained the verdict had the jury been untrammelled by instructions; nor would it be proper to decide that point, even had the record presented all the evidence, because, whatever the facts may have been, as the jury was not left free to decide for themselves on the effect of the proof, the judgment must be reversed, and the cause remanded for a new trial.

CHANCERY.

Brown against Parish.

[Mr. Haggin for Appellant: Mr. Crittenden for Appellee.]

FROM THE CIRCUIT COURT FOR WOODFORD COUNTY.

April 8.

Chief Justice ROBERTSON delivered the Opinion of the Court.

Sale of land
by description,
without refer-
ence to the quan-
tity.

OLIVER BROWN, the appellant, owning a tract of land near Versailles, and on each side of the road leading to Lexington, sold, on the 19th of March, 1831, to James Parish, a triangular piece, detached by the road from the residue of the tract and adjoining the land of Parish; and, in April of the same year, conveyed the legal title, by a deed reciting the payment of the consideration—

three hundred dollars—describing the boundaries by courses and distances, and designating the land, without any allusion to quantity, “*as being the piece of land known by the name of Brown’s Cut Nine-pence, be the same more or less.*”

Afterwards, in August, 1831, to obtain appropriate relief, Brown filed a bill in chancery, alleging that, when he sold the land, he supposed that the quantity was about eight acres; that he had since ascertained that the boundary contained seventeen acres and a quarter; that, in the contract, each party estimated the land at thirty five dollars per acre, and, therefore, three hundred dollars was the stipulated consideration; and that, prior to the contract, Parish had, by clandestine means, ascertained the actual quantity of acres, but fraudulently concealed his knowledge of that fact, although he knew that Brown was not willing to take less than thirty five dollars an acre.

All the material allegations of the bill, except as to the actual quantity of the land, were denied; and the proofs read on the hearing of the cause, establish the following, and no other material facts. *First.* The land was sold and was conveyed, *in gross*, by its name (“*The Cut Nine-pence*”) and by its boundaries only. *Second.* Between the date of the contract and that of the conveyance, Parish had, more than once, endeavored to ascertain the quantity by stepping, and had an actual survey made by a surveyor. *Third.* After thus ascertaining the quantity to be seventeen and a quarter acres, Parish said he had not expected that there was so much; that he supposed, when he made the contract, that the quantity was about nine acres, and that he was apprehensive that Brown would, if he ascertained the true quantity, refuse to convey the entire triangle. *Fourth.* Brown having been asked (before he ascertained the quantity, as we infer,) whether he had sold the land by the acre, and for how much an acre, answered that it was “*a lumping bargain*,” and then, to the interrogatory, “*suppose there are not more than four or five acres?*” he answered, “*it was a lumping bargain.*” *Fifth.* Parish having prepared a deed, describing the true quantity, and the courses and

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distances as ascertained by the surveyor, presented it, together with the plat of the survey, to Brown, who insisted that the surveyor was mistaken; offered to bet a large sum that the boundary did not contain as much as seventeen acres; said that he had not sold, and never would have sold, the land by the acre, but had sold it "as the piece of land known as the Cut Nine-pence, for a certain sum," and thereupon, *having had the quantity erased*, he signed and delivered the deed.

The circuit court dismissed the bill, and this appeal is prosecuted to reverse that decree.

Fraud or mistake in making a contract, must be established, to justify a decree for rescission, or relief on the ground of advantage obtained by one of the parties.

No proof of fraud in this case.

If the appellant be entitled to any relief, his equity must result from either fraud or mistake, or both combined.

The imputed fraud has not been established. It is not here necessary to discuss or decide the question whether, if Parish had known, by actual mensuration, the true quantity of land, (Brown believing that it did not exceed nine acres,) the failure to communicate the fact would have been that species of *suppressio veri* which is deemed fraudulent; for there is no proof that Parish had, at the date of the first agreement, ascertained the quantity, or knew that it exceeded or equalled nine acres; and the information, which he afterwards obtained, was communicated to Brown before he subscribed his name to the deed; and although Parish expressed the apprehension that Brown would not convey if he knew the true quantity, yet no artifice was used for concealment or delusion; but, on the contrary, the deed recited the courses and distances and quantity truly, as they had been ascertained by actual survey, and the plat of the survey, exhibiting all the same facts in a more authentic form, was shewn to Brown before he executed the contract.

The proof of a mistake insufficient.

Nor is there satisfactory proof of any such gross and palpable mistake as would justify a decree for any relief.

The question is not whether an executory agreement should be specifically enforced; but whether an executed agreement shall be modified and reformed.

The deed is the highest evidence of what the contract was ; it cannot be contradicted by testimony of an inferior grade ; and therefore, to justify a decree for any relief against its legal effect, on the ground of mistake merely in its execution, the proof must be clear and conclusive, and the mistake not only *gross* and *palpable*, but such as could not have occurred had not the party complaining been reprehensibly supine, or unreasonably credulous or incredulous, as to the truth and import of facts of which he had notice.

In this case, there is no such proof of any such mistake. The conveyance is not of a *tract* of land of *designated quantity*, "*more or less*"—but is simply a deed for a specified boundary of a tract of land designated by its name, and containing no specified quantity, either ascertained, stipulated or conjectured. It has been said, *arguendo*, by our predecessors, that, against such a deed, no *mere mistake* as to quantity (when there is no artifice or misrepresentation,) would authorize a decree for relief. Conceding that the principles of equity might justify relief against such a deed on such ground, in a *possible case*, we are nevertheless satisfied that such a case can but seldom arise, and must, when it presents itself, be characterized by peculiar circumstances of extraordinary mistake and indubitable hardship.

Here the appellant would not sell his land as a tract of any definite quantity of five, six, seven, eight, nine or ten acres. He said *he supposed* that the triangle contained *about seven, eight or nine acres*, but that he would sell it "*in the lump*," and in no other way ; and that, if it contained only four acres, still it was a sale "*in the lump*." Had there been only four or five, instead of eight or nine acres, would he have held himself liable, by contract or in honor, for the deficit ? The facts will hardly allow such a presumption. Then a duplication of his *conjectural* quantity should not entitle him to redress in a court of conscience. The facts tend to prove, in corroboration of the deed, that (for three hundred dollars,) he sold his "Cut Nine-pence"—his whole Cut Nine-pence—whatever it might contain, or whatever it might be worth. He has not even proved that the seventeen

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The deed of land conveyed is the best evidence of the terms of sale, and must prevail (as evidence of the contract) unless there is clear proof of fraud, or of some mistake—such as would never occur without great want of heed in the complaining party.

A party, for a sum certain, sells a piece of land, by its known name & boundaries, refusing to stipulate for, or to state, the quantity. The vendee, before the execution of the deed, ascertains the true quantity—but practices no fraud nor any concealment about it. Though the piece contains more than twice as much in fact, as the vendor supposed, he must abide the consequence of his inadvertency, having no remedy, or cause of complaint.

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and a quarter acres are worth much more than three hundred dollars; and there is not a semblance of *proof* that eight acres were worth as much as that sum.

But had there been satisfactory proof of a gross and injurious mistake, as to quantity, in the execution of the contract, the appellant would not have presented a case within the equitable rule. He *would not know* the quantity of land he had sold and was about to convey. Even after the deed and the plat, both giving the courses and distances and the true quantity, had been seen by him, he persisted in the determination to convey as he had sold—by the boundary and that only. It seems to us clear, therefore, that he has no just cause for appealing to the chancellor to be relieved from the consequences of such a contract. All the extraneous facts, properly considered altogether, do not contradict, but tend to confirm the legal import of the deed: that is, that Brown was indisposed to an ascertainment of the precise quantity, and a sale by the acre for the actual vendible value, but preferred a “chancing bargain” for three hundred dollars, for the “*Cut Nine-pence*,” whatever it might contain. He has not shewn any equitable ground for obtaining relief from such a contract, which he seemed inflexibly predetermined to make, and which he executed in the face of light and knowledge.

Decree affirmed.

CHANCERY.

Harris against Smith &c.

[Mr. Amos Davis for Plaintiff: Messrs. Wickliffe and Wooley and Mr. Crittenden for Defendants.]

FROM THE CIRCUIT COURT FOR PIKE COUNTY.

April 8.

Judge UNDERWOOD delivered the Opinion of the Court.

Statement of the facts and pleadings.

A judgment was obtained against Lester, for the purchase money of a tract of land, which he contracted for with the Prestons, who claimed under Smith &c. Les-

ter thereupon filed his bill, suggesting that Harris had purchased the land on account of the taxes due thereon, and had obtained a deed of conveyance therefor from the register; in consequence of which, apprehensions were entertained that the title of Harris would prove superior to that of his vendors, and those under whom they claimed. Lester therefore made Harris, the Prestons, Smith &c. defendants to his bill, prayed that they might be compelled to interplead, and set forth their various claims and titles; and in the event of being unable to obtain a good title, asked for a rescission of the contract &c.

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Harris answered, setting up the validity of his title under the register's deed. He made his answer operate as a bill against Smith &c., and prayed that they might be compelled to relinquish all claim, and that his title might be quieted &c.

Smith &c. answered, impeaching the validity of the register's deed; made their answer a cross bill against Harris, and prayed that he might be compelled to relinquish, in order to quiet their title &c.

In April, 1831, Lester dismissed his bill upon a compromise between himself and the plaintiffs at law. In July, 1831, Smith &c. filed their answer and cross bill to the bill of Harris against them. In October, 1831, Harris discontinued his cross bill against Smith &c. In October, 1832, the court took the cross bill of Smith &c. against Harris, for confessed, and rendered a decree against him, requiring him to convey to Smith &c. To reverse this decree, Harris prosecutes a writ of error.

The main question relates to the jurisdiction of the court. The holder of the legal title, not in actual possession, cannot, as a general rule, maintain a bill to quiet his title, and to compel a relinquishment of adverse claims. But in this case, we think the chancellor acted correctly in deciding the controversy between Harris

A party not in possession cannot maintain an original bill to quiet his title, or compel the relinquishment of an adverse claim. — But where one in

possession brings his bill against those from whom he derives title, and makes others also, from whose claims he apprehends danger, defendants—requiring them to interplead with his vendors—the chancellor will take jurisdiction as between these defendants, and settle the whole controversy; and the jurisdiction, having once attached, will not be taken away by the dismissal of the original bill; a decree upon any remaining cross bill, will be effectual.

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and Smith &c. Those claiming under Smith &c. were in possession. Lester made out a proper case for the interposition of a court of chancery in his behalf. Before he should be compelled to pay the purchase money, the chancellor ought to have seen that he could get a good title. There was no way to do justice to Lester but by compelling Harris and Smith &c. to settle between them who had the better right. They were properly brought before the court for that purpose. Harris undertook to settle his right by filing his answer, and making it operate as a bill against Smith &c. They, although protesting against the jurisdiction, entered upon the controversy with a view to compel Harris to relinquish, and persevered until a decree was rendered in their favor. The chancellor having thus gotten hold of the contest, as incidental to the administration of complete justice in behalf of Lester, there can be no doubt, if Lester had not compromised and dismissed his bill, and if Harris had not discontinued his cross bill, that it would have been necessary to adjudicate upon the conflicting claims; and then, as the chancellor delights to settle the whole of a controversy in its different ramifications, to prevent a multiplicity of suits, and all parties being before him, he would, by his decree, have put an end to the whole case between all the parties.

We do not perceive how the jurisdiction can be ousted by the conduct of one or more of the parties compromising or discontinuing the cross bill filed. It would be of evil tendency to allow such a practice. It might, after the trouble and expense of preparation, put the rights of a party, reluctantly drawn in, at stake upon the issue of a new suit. We cannot thus allow parties to withdraw from a jurisdiction which has fairly attached.

Upon the merits, the court decided correctly. The last proviso in the twenty third section of the act of 1799, entitled "an act to amend and reduce into one the several acts establishing a permanent revenue," saves the rights of *femes covert*s. There were two *femes covert*s hold-
 * The revenue law of 1799, under which land was sold for taxes, saved the rights of *femes covert*s—a sale of land in which any *feme covert* was a joint owner was invalid, and the register's deed passed no title.

ing a joint interest in the land at the time it was sold by the register for taxes. Since the sale, Smith &c. have paid the taxes for those years on account of which the sales were made, one of the *femes* still remaining covert. These facts effectually destroy the validity of Harris' claim.

Decree affirmed, with costs.

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1834.

Morrison
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Widow &c.

Morrison against Morrison's Widow &c.

CHANCERY.

[Mr. Haggin for Appellant : Mr. Crittenden for Appellees.]

FROM THE CIRCUIT COURT FOR WOODFORD COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

April 8.

MRS. MORRISON, having renounced the provision made for her by the will of her deceased husband, united in a bill with some of his children, for a settlement and distribution of the personal estate, and also claiming dower in seven slaves, which her husband sold and conveyed, during his last illness, to his brother David C. Morrison. She states that these slaves were all that her husband owned ; that their sale and conveyance were secretly made and purposely concealed from her, until after she had made her renunciation of the will, and were then immediately taken into possession by David C. Morrison ; that previous to her renunciation, she had consulted with him, whether she ought to renounce or not ; that he advised her to do it, and made a calculation of the value of her third of the slaves, to prove to her that such was her interest.

Statement of the case, as contained in the bill.

He admits that the conveyance to him was secretly made, and states that it was concealed from her during her husband's life, at his particular request ; admits that he staid a night at her house, between the death of her husband and her renunciation ; that whilst there, she consulted with him whether she ought to renounce, and

The answer—its admissions, and denials—the former sufficient without proof.

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that he did not disclose to her his purchase of the slaves, but denies that he advised her to make the renunciation, or made any calculation shewing it would be for her interest; on the contrary, he says he expressly declined giving her any advice on that subject, and referred her to her father, as the more proper and equally competent person to give her advice.

It is unnecessary to determine, whether the testimony of the witness relied on to prove he gave the advice as charged, be admissible, and if admissible, whether it would be sufficient, with the other circumstances, to prove that he did, in opposition to the express denial of his answer. We think his own admissions entitle her to the relief prayed against him.

A man makes a bill of sale to his brother, in secret, of all his slaves, and dies, leaving a will in which he provides for his widow. She thinks of renouncing the provision & taking the dower allowed by law, and consults the brother on the subject. He, nevertheless, conceals from her the fact, that the slaves had been conveyed to him, until she has made an election not to take under the will:—held that the concealment was a fraud upon the widow—in consequence of which she shall be allowed her dower in the slaves, the secret conveyance in the husband's life time notwithstanding.

It is not necessary to the case that he should actually have given the advice. The law, equally with morality, requires that he should have disclosed his title to the slaves, as well as forbore to give such advice. Every principle of ethics and of law, that requires the forbearance of the one, equally enjoins the performance of the other. The one was as much calculated to deceive and produce the injury, which ensued, as the other. No blameless motive can be presumed for his failure to disclose his title, when he knew that the possession of that information was indispensable to her, in order to attain a correct conclusion as to her true interest, on the subject about which she was consulting him. Even the alleged motive, for the original concealment, had ceased with her husband's death. None can be imagined for continuing it afterwards, but that of thereby tempting her to commit the act she did, to her own prejudice, through ignorance of the sale to him. He knew she was in error on that subject, and supposed the slaves liable to her dower claim. His failing to undeceive her, could only have resulted from a desire, on his part, that she should injure herself by making the renunciation. The obligation on him to make the disclosure was the more imperative, because he had been a participant in the original arrangement by which the sale had been made in secret, and purposely concealed from her.

When it was first determined, in the case of *Pasley vs. Freeman*, 3 D. & E. 51, that a man was liable to an action for knowingly and falsely representing an insolvent as worthy of credit, it was at the same time conceded that he was not bound to give his opinion or information on such subject, if he chose to withhold it, and that he had the privilege of silence. He, however, has no such privilege of reserve and silence, when he witnesses a negotiation for his property, or when he is applied to by one intending to purchase, to know whether he has any claim to it. The purposes of trade, and the interests of society generally, require that, one intending to purchase should have the right to make such enquiry, and that the other should be bound to answer. The law accordingly makes it his duty to give an answer. None of the reasons upon which he is exempted from communicating his knowledge of the insolvency of his neighbor, require a similar exemption when asked as to his interest in property which the enquirer is about to purchase. There can be no legitimate motive for concealing his proprietorship sufficient to exempt him from the fulfilment of such a social duty. The law attaches no importance, and allows no validity to any such motive. All its principles tend to promote and enforce the uncloaking rather than the concealing the true proprietorship of property. The information which one has of the state of his neighbor's affairs is his own. No other can claim it of him as a right. The rules of morality would, no doubt, many times, require its disclosure. But it is a duty of too imperfect an obligation for the law to enforce. Such information is not a species of property to be trafficked with, and in the purchase of which a third person may be defrauded and injured. It is not a permitting another so to use that which is ours, as to prejudice others. On the contrary, if, when apprized that our own property is about to be sold by a third person, and when applied to, we fail to disclose our right, we give an implied assent to the sale, and by permitting him so to use that which is ours, to the prejudice of others, we violate the golden rule for our go-

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One who has a claim to property, and stands by and sees another negotiating for the purchase of it, and remains silent; or who being consulted about his title or claim to property, or about the policy of a purchase contemplated by another, is bound to disclose his right, title or claim to the property in question; and if he disclaims, or remains silent, he is guilty of fraud upon the party contemplating the purchase,—and shall be postponed in his favor.—To this principle, that of the preceding note is analogous.

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vernment in the enjoyment of all property, and become participants in the fraud of the seller.

This court has repeatedly recognised and acted upon the principle, that the owner of property shall not, with impunity, either advise another to purchase it of a third person, or stand by pending a negotiation for it, without disclosing his right. It has been still more frequently and extensively acted upon in other courts. This case comes within the reach of that principle. The *standing by*, spoken of in the books, does not mean an actual presence, a meeting face to face of both vendor and purchaser at the final consummation of the bargain. The application to him for information, is equivalent to bringing him to the treaty ground, and making him witness it; and if at any stage of the negotiation, he is present, and fails to apprise the purchaser of his right, his silence is treated as an assurance that the vendor has the right, or at least that he himself has none. The plainest dictates of honesty, as well as public policy, require that he should not afterwards be permitted, for his own benefit, to retract this assurance. It is true, that, in *Osborn vs. Lee*, 9 *Mod.* 96, it was held, that a person having an incumbrance on an estate is not bound voluntarily to notify one whom he knows to be in treaty for its purchase, unless he be present whilst the treaty is going on; and, in *Ibbotson vs. Rhodes*, 2 *Vern.* 554, it was decided that, an incumbrancer, who, when applied to, denied that he had any incumbrance, should not be postponed in favor of the purchaser who made the application, because the latter, at the time of making the application, had not communicated his intention of making the purchase, and the other was under no obligation to gratify mere idle curiosity. These cases do not militate against the general principle, but, like all mere exceptions to a rule, tend rather to prove and sustain it. In the first case, it is evident from the reasoning of the court, that if the incumbrancer had been present at the negotiation, he would have been bound to disclose his incumbrance. In the second, the court awarded an issue to ascertain whether the purchaser had apprized the incumbrancer of his intention to purchase, which would not have been done

unless that had been deemed a controlling circumstance.

"All laws which go to enforce moral and social duties stand upon the best and broadest basis." Such of them as are to be found in our code should be enforced according to their true spirit. They are none of them the creations of mere speculative ethics, but of sound practical wisdom, adapting its legislation to the real exigencies and actual condition of society. They should never be strained beyond their proper scope and bearing; neither should exceptions from their operation be allowed upon nice and unessential distinctions. It can avail nothing, therefore, to distinguish this case from others found in the books, in the particulars of there not having been an actual negotiation pending between Mrs. Morrison and a third person, for a surrender of her interest under the will, in consideration of what the law would give her in opposition to it, and that she did not actually propound the question to David C. Morrison, whether the slaves were his or not. The act of renunciation depended upon her own volition merely, and the transaction was insusceptible of the character of a negotiation with a third person. But it had all the ingredients necessary to the doing herself prejudice through ignorance of his rights, which rendered it equally incumbent on him to disclose them. She did not ask him in terms, whether the slaves were his, because she had no reason to suspect they were. He could not but have been conscious, that, from that cause alone, she forbore the question. When she communicated her object, and asked his advice, he was apprized that she was no idle or impertinent enquirer, and that the obtaining of a portion of the slaves was the principal, if not sole inducement to the act she had in contemplation. Aware, as he was, that she had been kept ignorant of his purchase, the asking his advice, was the asking each and every question necessary to the elucidation of the subject, and affording her the means of forming a correct judgment as to her course. It was a substantial traffick-
ing for his property, in ignorance of his concealed right,

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A man takes a secret conveyance of slaves, & permits them to continue upon the farm of the grantor until after his death, and until his widow, ignorant of the conveyance, and believing that the slaves constitute part of the estate of which she may be endowed, renounces the provision made for her by the will: permitting the slaves to remain on the farm, whereby the widow was deceived as to the amount of estate left by her husband, is a fraud upon her, affecting the grantee's right, against which, she shall be allowed her dower in the slaves.

under his view and in his presence. He must abide the penalty of his culpable silence.

Should we be ever mistaken in this application of the principle, there is another of analogous character, which equally leads to the same result. If David C. Morrison, after his purchase, or even after the death of his brother, had not suffered the slaves to remain where they were; if he had exercised his absolute proprietorship by taking them into his own possession, Mrs. Morrison would not have been liable to be deceived by false appearances into the renunciation which she made. If she had stood strictly in the attitude of a purchaser, the bare fact of leaving the possession where he did, would have been held such full evidence of a fraudulent intent on his part, as effectually to have shielded her from any assertion of his claim. The circumstances of this case give the fullest force to that implication.—

When he suffered the possession to remain where it was, after he had been apprized of her intention to renounce, and after he had failed to disclose his ownership, he did that which was best calculated to deceive her; and although she may not stand strictly in the attitude of a purchaser, yet it is no stretch of the principle to suffer it to protect her as though she had been. Her rights are fully as ineritorious and worthy of protection as those of a purchaser. She was liable to be deceived, and was deceived, in the very way, and by the very acts, which the law presumes will deceive him. The principle, therefore, that protects him can be little worth—it must rest upon a very unstable basis, if it cannot be made to afford the same protection to her also. There is no virtue in the mere circumstance of being a purchaser, otherwise than as it presents a subject worthy of the protection of the law against fraud. Its antipathy to fraud is not partial, or confined to particular cases or classes of cases, except so far as classification serves to embrace and indicate every thing it deems worthy of protection. Every thing worthy of its protection it panoplies in proof against all the approaches of fraud. When the purchaser of personal estate, by absolute bill of sale, leaves it in the possession of the vendor, the law,

for the protection of a subsequent purchaser without notice, infers a fraudulent intent on the part of the first purchaser ; and then, by reason of the fraud so ascertained, postpones his claim to that of the second purchaser. Here, the leaving of the slaves where they were, the not taking them into his own possession, was equally calculated to produce a similar mischief to the widow. But, we are not left to the implication the law makes in favor of a purchaser, for the attending circumstances leave little room to doubt, that the possession was so left for the express purpose of deceiving her into an act injurious to herself. There is no explaining the conduct of David C. Morrison on any other hypothesis. Even though, therefore, the law would not infer the fraudulent intent for the protection of the widow, in this case, as it would in favor of a purchaser, yet, when that intent is otherwise satisfactorily made out, the result in her favor must be the same. It is no solid objection to this application of the principle, that it is new in the instance. The application of the principles of law, for the prevention of fraud, are circumscribed by the bounds of guile and malevolence alone : where they reach, it will also extend, to shield the innocent and unwary.

The prayer for the distribution of whatever personal estate there may be in the hands of the executor, appears to have been overlooked in rendering the decree. On the return of the cause, Sarah C. Morrison will again have to be brought before the court, either as complainant or defendant, and that part of the case properly disposed of.

The decree must be reversed, with costs, and the cause remanded for further proceedings, and with directions to allot Mrs. Morrison dower out of the slaves, as claimed by her, and for a decree against David C. Morrison for her third of their hire from the filing of her bill.

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Morrison

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MOTION.

Roman vs. Caldwell's Heirs.

[Mr. Chinn and Mr. Haggin for Plaintiff: Mr. Owley and Mr. Turner for Defendants.]

FROM THE CIRCUIT COURT FOR JESSAMINE COUNTY.

April 8.

Judge NICHOLAS delivered the Opinion of the Court.

Judgments against heirs, upon obligations of their ancestors, are to be levied of estate descended, and if any such judgment be entered without being so modified, the omission will be deemed a mere clerical misprison, which may be amended, at the same, or any subsequent term.

There is no statute, nor any analogous principle, limiting the time within which the amendment may be made. It may be done at any time while the judgment remains in force

In 1824, Roman obtained judgment, by default, against the defendants as the heirs of Thomas Caldwell, but the judgment contained no direction to be levied of the estate descended. In 1831, the circuit court, on the motion of the defendants, caused it to be amended, *nunc pro tunc*, so as to render it leviable of the estate descended alone.

It is contended, that the error was not such as could be amended by the circuit court, after the term at which the judgment was rendered; and if it was, still, that the application to amend came too late, after the lapse of near seven years.

If the power of the court to make such a correction at another term were to be tested alone by the earlier English decisions, or by whatever of consistent principle is to be extracted from the multifarious cases on the subject of amendments, we should have much difficulty in sustaining such power. But it was determined, *Short vs. Coffin*, 5 Burr. 2730, that a judgment *de bonis propriis*, where it should have been *de bonis testatoris*, was a mere clerical misprison, amendable at a subsequent term, and that decision has been adopted and followed by this court. *Speed vs. Hann*, 1 Mon. 19. *Smith vs. Todd*, 3 J. J. Mar. 298. The case of a judgment against heirs is so perfectly analogous in every particular, that there is no room for a legal distinction, and it must be governed by the same principle.

There is no statutory bar to the making these amendments; but it is contended, they should be barred by the statutory limitation to writs of error, upon the same principle that a court of equity prescribes that bar to a bill of review. But there does not exist sufficient an-

alogy between the two classes of cases to justify such application of that principle. If any case could be found where a court of equity had refused to amend a clerical misprison in a decree, after the time allowed for prosecuting writs of error, then the analogy would be complete. But no such decision has been cited, nor have we been able to find any. A writ of error operates by correcting an error in the judgment of the court. An amendment corrects no error in the judgment of the court, but only what is considered a mere slip or mistake of the clerk in entering it up. It is merely made to read according to what it is supposed necessarily to have been when rendered. The legislature having prescribed the bar as to writs of error, and not as to amendments, is an indication of its opinion and of its will that there was such a distinction between them, as to require this difference in the law concerning them. It would be an act of supererogation on the part of the court to say, there was no such distinction, and to bring them both within the same bar, by reason of any supposed parity of reasoning equally requiring it as to both.

In *Smith vs. Todd*, 3 J. J. Marshall, a similar amendment of a judgment against an executor, rendered in 1816, was allowed to be made in 1828, and it is there said, that such amendment may be made at any time whilst the judgment remains in force.

Judgment affirmed, with costs.

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1834.

Chiles et al.
vs.
Conley's heirs.

Chiles et al. vs. Conley's Heirs.

EJECTMENT.

[Messrs. Wickliffe and Wooley and Mr. John Trimble for Appellants :
Mr. Hanson for Appellees.]

FROM THE CIRCUIT COURT FOR MONTGOMERY COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

April 9.

ON a joint and several demise in the name of Arthur Conley's heirs, two of the lessors (now appellees) obtained a verdict and judgment, in ejectment, against

Character of the
suit.

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1834.

Chiles et al.
vs.
Conley's heirs.
Title of the de-
fendants.

Title of the
plaintiffs.

William Chiles and others claiming under him, for two undivided seventh parts of a tract of land.

Chiles claimed the land in virtue of a conveyance to him, in 1816, by the heirs of William Hays, who was a patentee, and he also held a deed from some of the lessors, but not from either of those who obtained the judgment.

The precise sources, character and extent of the claim of the appellees, do not clearly appear ; but we may infer that they rely chiefly on a conveyance from William Hays, the patentee, to one Taylor, in 1793, for a part of the land in controversy, and a deed from Taylor to themselves, in 1825 ; a paper purporting to be a deed from one Bridges to their ancestor, in 1806, for another portion of the land ; a sale by the same patentee (Hays) to Bridges, in 1794, and continuous occupancy, under those contracts, from their dates, for a period exceeding twenty, but less than thirty years.

In revising the judgment, the following points only will be specially noticed :—

First. On the trial, the circuit court refused to permit the appellants to read the record of a suit in chancery which had been prosecuted by the lessors against the appellant, Chiles, and against the heirs of William Hays and of Bridges and others, for adjusting the title to the land for which this suit was brought ; and that decision by the circuit judge is now complained of as erroneous.

This court need not decide whether every part of the record was so totally irrelevant as, on that ground, to be inadmissible as evidence in this case. Whether there is any thing in any part of it, that could operate in any way in counteracting any presumption of a conveyance from William Hays to Bridges, or whether, in other respects, it should tend, in any degree, to affect the claim of the appellees, are questions which we shall not consider ; because, however the record, if any portion of it were admissible, might operate, there being much of it that would be illegal and irrelevant, the circuit court did not err in refusing to admit the record as offered, even had a portion of it been, by itself, admissible for

A record offered entire as evidence, when some portions of it only are relevant, must be rejected.

any purpose or, in any degree, had been proper evidence. Moreover, two of the appellants were not parties to the chancery suit; and unless the record of that suit would be legal evidence against them, it would not be admissible for them. The record does not shew certainly what privity exists between those two of the appellants and Chiles, the other appellant.

Second. On the motion of the appellees, the circuit court gave the following instruction to the jury:—"that the deed from Hay's heirs to Chiles passes no title so far as said deed covers the land of Taylor;" that is, the land which Hays had previously conveyed to Taylor. As the deed to Taylor had never been recorded, it was inoperative so far as Chiles was concerned, if he was a *bona fide* purchaser, for a valuable consideration, without notice. Whether he was such a purchaser, and whether at the time of his purchase (that is when he paid the consideration and obtained his deed,) he had notice, express or implied, were questions which the jury, and not the court for them, had a right to decide. The instruction of the court was, therefore, erroneous.

Third. The court also gave to the jury the following instruction:—"that the instrument of writing from William Bridges to Arthur Conley, dated 6th February, 1806, was a deed of bargain and sale, and sufficient to transfer the title of *Hays* to Conley." The writing here alluded to is as follows:—

"For value received, I bargain and sell unto Arthur Conley, my whole right of improvement made by John Brown, and all the land as far as Thomas Miller's claim interferes with my claim. Given under my hand and seal, this 7th day of February, 1806.

WILLIAM BRIDGES. (Seal.)

Test. *Thomas Boyd,* }
John Robinson." }

The literal import of this writing is that of an executed agreement, or a conveyance of the title which the vendor held. It contains all the essential requisites of a conveyance in fee simple. It is informal and unusually summary, when compared with the redundant, quaint

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A record which cannot be used against parties to a suit on trial, because some of them were not parties to the record, cannot be used for them.

An unrecorded deed has no effect against a subsequent *bona fide* purchaser, for a valuable consideration, without notice; but whether the party to be prejudiced by the deed, is that description of purchaser, or not, is a question to be determined by a jury, not by the court.

Any writing that identifies the parties to a contract for land—describes it—acknowledges a sale in fee of the vendor's right, for a valuable consideration, and is signed and sealed by the grantor, and duly attested, is a good deed of bargain and sale, however concise or summary the language may be.

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and prolix style of modern conveyances by deed. But it is not more laconic or less comprehensive than the ancient Saxon deeds, and is almost as formal and elaborate as the antiquated charters of enfeoffment; and, indeed, its form and style are, in some respects, preferable to the repletion and repetitions which unnecessarily characterize and greatly deform modern deeds of conveyance. It is sealed, and signed, and attested properly; it shews a valuable consideration; it identifies the parties; describes the land, and acknowledges an absolute executed sale in fee of the vendor's right. These constitute a deed of conveyance; and therefore, as this instrument contains no provision or intimation to the contrary, this court cannot, by any allowable process of interpretation, give to it any other character or effect than those of a deed of bargain and sale. *Co. Lit.* 7, a. 4 *Kent's Com.* 460-1.

An executory contract for land—with 20 years possession, being shown, a jury may, without further proof, presume a legal conveyance; but the nature of the holding in such a case, may be explained, and the presumption rebutted, by proof tending to a contrary conclusion. It is a presumption, founded upon law and fact, which a jury may indulge, or reject: not a mere conclusion of law. They should be instructed as to the legal effect of the possession &c. and left to decide upon all the evidence. For the judge to decide absolutely that the legal

But, nevertheless, the circuit court erred in instructing the jury that this deed from Bridges to Conley, "was sufficient to transfer the title of *Hays* to Conley." It transferred no other title than that which Bridges held; and there is no proof that he had acquired the legal right, unless a conveyance from Hays to him should be *presumed*. But such a presumption, should the facts authorize it, is not, in this case, conclusive and incontrovertible, but is, at the utmost, only of that class denominated "presumptions of law and of fact;" and which, therefore, may be repelled by facts to be weighed and considered by a jury. Occupancy for twenty years under an executory agreement of purchase, in the absence of any other explanatory or inconsistent facts tending to a contrary conclusion, will, as an artificial deduction of law, create a presumption of a conveyance; and a court may so inform a jury. But though such a technical effect be given to such a state of fact, nevertheless, the presumption is not of that kind denominated "presumptions of law" merely; such as the legal presumption of fraud, or the legal presumption (at common law,) of a consideration for every deed, and which could not be resisted, contradicted or explained, by extraneous facts. As the presumption in

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this case, is not legal only, and therefore inflexible, but is a presumption of both law and fact, and consequently may be rebutted by facts, the circuit court ought not to have given the peremptory instruction to the jury, but should, after telling them what the law of the case was, have left the deduction to *them*. The possession was not adverse as long as the agreement, under which it was taken, continued to be executory; for though Bridges had conveyed to Conley, the latter could have held, in contemplation of law, only as the former had. If Bridges held as *quasi* tenant, his vendee held in the same way under the first vendor.

In consequence only of the two errors which have been noticed, the judgment must be reversed, and the cause remanded for a new trial.

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title has passed, because an executory contract and twenty years possession appear, is erroneous.

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EJECTMENT.

[Mr. Hanson and Mr. Simpson for Appellant: Messrs. Wickliffe and Wooley for Appellee.]

FROM THE CIRCUIT COURT FOR MONTGOMERY COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

THE lessor of the plaintiff claimed the land in controversy under two grants to William Hays—one bearing date in May, 1813, the other in June, 1801.

The defendant claimed under a grant to Jeremiah Moore, of two thousand acres, dated in August, 1785.

The lessor obtained a verdict and judgment, and the defendant has appealed.

It is clear, that the verdict and judgment are erroneous, unless the lessor, and those under whom he claims, have had such a continued adverse possession of the land in controversy as to toll the right of entry founded

April 9.

The original grants under which the parties respectively claim;—numerous conveyances, and possession of parts of the land by various tenants—the lessor's title, under the junior grant, depending on *possession*.

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on the senior grant. The first and most important enquiry, therefore, relates to the possession.

Moore, in February, 1794, conveyed an undivided third part of the said two thousand acres to James French, in consideration of his services in surveying, registering &c.

In September, 1794, a deed was executed by Moore, the patentee, by Withers Smith, by Th. Lewis and the said French, by which deed the tract of two thousand acres was divided into four lots. The most northern lot was assigned to Withers Smith, and contained six hundred sixty six acres and two thirds. The next lot, towards the north, was assigned to James French, and contains six hundred sixty six acres and two thirds. The next lot was assigned to Withers Smith, and contained three hundred thirty three acres and one third; and the remaining lot, to the south, containing three hundred and thirty three acres and one third, was assigned to Thomas Lewis. One question stated is, whether this deed *inter partes*, and which seems to have been designed as a deed of partition, passed the title from Moore, the patentee, to the other parties.

In February, 1814, the heirs of Withers Smith conveyed the eastern half of his lot of three hundred thirty three acres and one third to Hardage Smith; who, in May, 1826, conveyed the same to Jones, the appellant. The land thus conveyed to Jones constitutes the subject of controversy.

It seems from the proof, that French, claiming one third of the two thousand acres, under an executory contract, settled two men upon the tract—one named Hancock, the other Anderson, with a view to take possession of his undivided third part, prior to the year 1794; that Withers Smith and French, in the fall of 1794, went upon the two thousand acre tract, and, by marked boundaries, divided the tract among those entitled to it, in the manner stated in the deed of September, 1794. In this division, the improvements of Hancock and Anderson were included in Smith's northern lot of six hundred sixty six acres and two thirds. No one had possession, by actual enclosure, of any part of

Smith's lot of three hundred thirty three acres and a third, except Conley, and he had a "very small piece" enclosed, when the division was made, claiming under Hays.

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A man named Steen proved, that, in the fall of the year in which Morgan's station was taken by the Indians, (which event, as shewn by other testimony, took place April 1st, 1793,) under a contract with Hays for fifty acres, he built a house, and settled on it. He cut the house logs in the summer, with permission from Hays. Hancock was living on Moore's tract when Steen first went to the place he improved. Steen's improvement was within the interference between the claims of Moore and Hays; but no part of his fifty acres embraced any of the land in Smith's lot of three hundred thirty three acres and a third.

A man named Bridges, in the summer of 1794, cut house logs, and, in the fall of that year, settled, claiming to hold under Hays, within the interference, and upon that part of Moore's claim allotted to French. No part of the enclosure of Bridges embraced any land within the boundaries of Smith's lot of three hundred thirty three acres and a third. Bridges, however, contracted with Hays for six hundred acres of land, and the boundaries of the six hundred acres did interfere with Smith's lot of three hundred thirty three acres and a third. In the fall of 1796, Bridges settled a tenant named Maberry on the land now in contest. In 1802 or 1803, B. Thomas, acting as agent for Withers Smith, put Dinsmore and Durham in possession of the place where Maberry settled, and the tenants of Smith, and those claiming under him, have been in possession ever since, gradually extending the improvements.

Arthur Conley, in the fall of 1793, built a half faced camp, and cut and collected house logs, and, in February, 1794, built his house and settled with his family upon a hundred eighteen acres and three fourths, designated on the connected plat, claiming under Hays. This hundred eighteen acres and three fourths interferes with Smith's three hundred thirty three acres and a third. Conley's dwelling house was out side of Moore's line.

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In 1793, a man named McQueen settled on Smith's three hundred thirty three acres and a third, in the bend of the creek, and, in 1794, enclosed ten or twelve acres, claiming, "*as the witness understood,*" about fifty acres under Hays.

In the spring of 1795, a man named Berry settled below the bend of the creek, under Arthur Conley, and near his hundred eighteen acres and three quarters. He enclosed five or six acres, and raised a crop of corn. This is the place where Thomas Foster lives, as tenant to Jones, upon the three hundred thirty three and a third acres lot of Smith.

McQueen gave up his possessions to W. Bridges, and he transferred them to Arthur Conley.

In the spring of 1793, W. Cook cut and collected house logs, and, in the fall of the same year, built his house, and moved his family upon his two hundred and ten acres, designated on the connected plat, and which he had bought from Hays. Neither Cook's house, nor any part of his enclosures, interfered with Smith's three hundred thirty three acres and a third, although part of his enclosures extended over the line of the two thousand acres survey of Moore.

In 1795, T. Dale settled on Cook's two hundred and ten acres, under a purchase from him. His house was out side of Moore's line, but he cleared and fenced a field over the line on Lewis's lot, in three or four years after he settled. His improvement did not run into Smith's lot. Dale and his widow have continued in possession of this land ever since its first settlement.

In 1814, Arthur Conley occupied the field in the bend of the creek settled by McQueen, and another field on the opposite side of the creek, both within Smith's lot of three hundred thirty three acres and a third.

A landlord who settles a tenant, without bounds, is in possession to the extent of his claim. But if the tenant is restricted, by metes & bounds, to a part only

The plaintiff in ejectment must recover upon the strength of his own title. If, therefore, Chiles and the heirs of Hays had no right to the possession of the land in contest, in consequence of the actual occupancy of the land, as manifested by the foregoing facts, they could not recover in this suit, according to law, in virtue of the junior grants. We shall enquire how far the right

of entry, under the patent to Moore, was tolled by the occupancy of those who settled and claimed under Hays, in the manner aforesaid.

The possession and settlement of Steen could not extend beyond his fifty acres; and as these did not interfere with the three hundred thirty three acres and a third allotted to W. Smith, the possession and settlement of Steen cannot confer any right upon the lessors of the plaintiff to the land in contest, unless the entry of Steen upon his fifty acres, as the vendee of Hays, did, by operation of law, put Hays in the possession in fact of the whole interference between his claims and that of Moore. Such a conclusion, from such premises, is not sustained by any authority or adjudged case known to us, and is, we think, unsupported by the reason and analogies of the law. The extent of possession depends upon the *quo animo* of the entry. It cannot be supposed that Steen intended to extend his possession beyond his purchase, and how his limited possession can be made a possession in fact of lands not actually occupied by the vendor, it would be hard to shew upon any legal principle. A landlord who settles a tenant, *without bounds*, upon a tract, is in possession to the limits of the claim. A patentee extending shelter to an occupant whose possession is meted and bounded, acquires thereby a possession only to the limits of the occupant's claim. The doctrines of the law, well settled by former adjudications, if applied between vendor and vendee, would limit the vendor's possession to the boundary claimed by the vendee, and these settled doctrines could only apply in those cases where the vendee restored the land and gave up his possession to the vendor. We do not perceive in the settlement of Steen any thing to strengthen the claim of the lessors of the plaintiff, or to give them title.

The settlement and possession of Bridges, as vendee of Hays, outside the lines of Smith's three hundred their shares in severalty, if a junior patentee, whose claim covers the whole tract, or more than one of the shares, makes an entry upon the land, his possession does not extend beyond the boundaries of the share upon which his entry is made, and the other shares are unaffected by it; for one co-tenant, after partition, is not bound to protect the allotments of the others.

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of the land, the landlord's possession, by this tenant, is in like manner restricted. So, where the proprietor of a tract sells a portion of it, designated by metes & bounds, and the vendee enters, his possession, depending upon the *quo animo* of his entry, which must have been to take possession of his own land merely, is restricted to his own boundaries, and has no effect as an entry upon, or possession of, the rest of the tract.

Where co-tenants make partition, and hold

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thirty three acres and a third, can have no effect in favor of the lessors of the plaintiff. He was evicted by French, claiming under Moore. But it is contended that Bridges, by entering upon the six hundred acres outside of Smith's lines, acquired an actual possession to the extent of the whole. Suppose he did; there is nothing in the record which shews the position of the six hundred acres, or to prove that it covered all the land in contest; and if this be the foundation of the recovery, it cannot be sustained, because of the uncertainty. But it does not follow, under the facts proven, that his settlement gave him possession coextensive with the limits of the six hundred acres. If the two thousand acre tract of Moore was actually divided, and a deed of partition executed conveying the lots to the several claimants, before Bridges settled upon his purchase, then his after-settlement upon the lot of French would amount to an ouster of French only. The settlement and improvements made on French's lot, under such a state of case, would not lay a foundation for barring the right of entry into his lot by Smith. Where a tract of land is divided among several claimants, no one is bound to protect the lot of another from disseizors, intruders or trespassers. The several claimants are not bound, after the division, to take notice of any settlement or trespass which does not immediately affect his particular lot. His right of entry upon his lot cannot be tolled by the actual possession of the whole or part of a different lot. The effect of the partition is to convert the parcels held by the different claimants into as many distinct tracts, and the entry of a junior patentee will not give possession of any, except that within the boundaries of which he enters.

A claimant cannot avail himself of the possession of a former tenant whose title he has not acquired.

Let it be conceded, however, that the settlement of Bridges was before the partition, and that he acquired the possession to the extent of his six hundred acres, and that his six hundred acres covered the whole, or nearly all the land in contest. Mrs. Bridges proves, that Hays made her husband a deed for the land. There is nothing in the record to shew that Bridges or his heirs ever reconveyed the land to Hays, or his heirs, or to Chiles.

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Nor does it appear that the lessors of the plaintiff have, in any manner, become entitled to the possession of Bridges, or the possessory right to the land, which his possession conferred, supposing it to have continued for twenty years. If any one is entitled to the land under the settlement and possession of Bridges, it is his heirs, in the present aspect of the case.

That Bridges was possessed of part of the land in contest, by his tenant, Maberry, as far back as 1796, is clearly proved, and need not be regarded as conceded for argument merely. In 1802 or 1803, Smith's agent put Dinsmore and Durham in possession of this place. How Thomas, the agent, effected the dispossession of Maberry, or his landlord, Bridges, does not appear. It would seem, however, from the proceedings in the record, that this dispossession was regarded by the circuit court as extending to the ground actually enclosed by Maberry, for to that extent the judgment is released. According to this idea, Bridges, by his tenant, having acquired the actual possession of the whole, in 1796, and having been dispossessed of a small part only, in 1802 or 1803, continued to possess the residue, and thus twenty years possession may have run in his favor. This view is incorrect. "To make the bar of twenty years possession operative and effectual to destroy a right of entry, it is necessary that the possession claimed as adverse should be shewn to be continued and uninterrupted. Or, in other words, if there is any period during the twenty years, in which the person having the right of entry could not find an occupant on the land, against whom he could bring and sustain his ejectment, that period cannot be counted as a part of the twenty years. For it would be absurd to suppose that a bar was progressing against him at a moment when the law afforded him no action." This is the language of the court, in the case of *Trotter vs. Cassaday &c.* 3 *Marsh.* 366. When the tenant of Bridges was turned out, and the tenants of Smith put in, no matter by what means, (unless subject to an estoppel, which does not appear,) against whom could Smith, or the person entitled to enter under the patent of Moore,

The possession, to bar an adverse entry, by time, must be continued—uninterrupted: for the law will not allow that time is progressing against a claimant, when he can find no occupant on the land, to bring suit against.

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The possession acquired under a *ha. fa.* upon a judgment in ejectment, has relation back to the commencement of the suit; and the time between that and the execution of the *ha. fa.* (tho' the execution has been long delayed by injunction, or otherwise,) cannot be counted to make up twenty years of adverse possession.

A statement by a witness of what he understood—not stating from whom he understood it; as that a tenant entered, claiming so much land, or under such a title, “as witness understood”—is too uncertain & indefinite for the foundation of a verdict.

bring their ejectment? Certainly not against Bridges or those claiming under him, when they were not possessed. It follows conclusively, that Bridges and those claiming under him, have not had such a continued uninterrupted possession as will bar the right of entry, or confer a right of possession.

Arthur Conley's possession is to be considered as embracing the settlements of McQueen and Berry as well as his own. Take the whole together, and they confer no right on the lessors of the plaintiff, because, in 1814, before Arthur Conley or those under whom he claimed, had been twenty years in possession, Hardage Smith instituted an action of ejectment, and prosecuted it successfully to a judgment, against the heirs of Conley and Hays, in 1818, and these were removed by writs of *habere facias*, in 1829 and 1830; or rather Chiles, who had come into possession after the institution of the suit, was turned out, and the possession delivered to Jones, in pursuance of the directions of Smith. It is too late now to enquire whether this judgment was right or wrong. It must be regarded as settling Smith's right to the possession as against the heirs of Conley and Hays; and, consequently, when possession was taken under Smith, in 1829 and 1830, it related back to the institution of the suit in February, 1814. Thus the time running between the commencement of the suit, and the delivery of possession under the writs of *habere facias* cannot be counted to make up twenty years of continued adverse possession.

The proof is, that a very small part of Conley's improvement had been extended into Smith's three hundred thirty three acres and a third when the division of Moore's two thousand acres took place, in the fall of 1794, and that his house was built in February of that year, outside of Moore's line. The particular time when the enclosure was extended over the line is uncertain, and it is possible, though we think very improbable, that it was extended over prior to the 18th of February, 1794. If so, Conley had possession of his hundred eighteen acres and three quarters to the extent of the interference with Smith's three hundred thirty

three acres and a third, for twenty years prior to the institution of the suit. McQueen settled in 1793, claiming, *as the witness understood*, fifty acres under Hays.—Supposing the possession of McQueen to have been continued by Conley down to the commencement of the suit, there would have been twenty years adverse possession of this fifty acres, if it had been laid off by metes and bounds. Taking the testimony in the most favorable light to the lessors, it does not justify the verdict and judgment to the extent rendered. For upon this evidence, the recovery could not, upon any legal principle, be extended beyond the interference covered by the hundred eighteen acres and three quarters, claimed by Conley, and the fifty acres claimed by McQueen. As to the settlement of McQueen, however, the testimony is too indefinite. It does not appear that the fifty acres claimed was meted and bounded, and the declaration of the witness; that he *understood* McQueen claimed under Hays, is no evidence that such was the fact. Who did he understand it from? It may be hearsay merely.

Berry's settlement was within less than twenty years prior to the institution of the suit. Cook's settlement cannot give the lessors any right. If any one has right growing out of Cook's settlement, to the ground common to Cook's two hundred and ten acres, and Smith's three hundred thirty three acres and a third, it is his heirs, and not the lessors of the plaintiff.

In 1817, Chiles, as lessor, instituted an action of ejectment, against Conley's heirs, to recover the land possessed by them and their ancestor. In 1818, Chiles obtained a verdict and judgment. An appeal was prosecuted, but the judgment was affirmed in 1820. Can this proceeding, at the instance of Chiles, give him, or the lessors in the present action, a right to recover? If two actions of ejectment be pending at the same time, against the same *terre-tenant*, prosecuted by different lessors, and judgment is rendered, in each action, for the plaintiff, what effect will the entry of the lessor upon the

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If two ejectments, by different plaintiffs, with different titles, are pending at the same time, against the same tenants, who, unconnected with either, hold adversely to both parts; & one of the plaintiffs, having recovered his judgment, is put into possession; after which the

other also recovers—the latter cannot turn out the former, by virtue of his *habere facias* against the defendants to both suits. The right, *as between these two successful claimants*, must be tried in a suit between them, before either can turn the other out.

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A purchaser, *pendente lite*, from the landlord of tenants sued in ejectment, is bound by the judgment, for, or against, them.

land recovered, in pursuance of his judgment, if his suit was commenced last, have upon the rights of the lessor who first instituted suit? Will it be unlawful for the lessor who first sued, to turn the other out, by the *habere facias* against the defendant to both suits? If each lessor asserted a different title against the tenant in possession, and if the tenant holds adversely to the titles thus asserted, and is not privy to or connected with either of the titles, we think that the lessor who obtained possession under his judgment first, could not be dispossessed in virtue of a *habere facias* against the tenant, in favor of the lessor, in the other action. The rights of such claimants ought to be tried, in a suit to which they were parties, before either should molest the other, gaining possession under a judgment against the *tenant*. Such, however, is not the attitude in which Chiles is presented. He claims the same title under which Conley entered, and to which he and his heirs owed allegiance. His claim to this title is founded on a purchase from the heirs of Hays, made subsequent to the institution of the suit by H. Smith in 1814, and after they had moved the court to permit them to defend the title with Conley's heirs. The possession of Conley's heirs was not adverse to the title asserted by Chiles, but in support of it. Under these circumstances, we regard Chiles as a *pendente lite* purchaser from the landlord of the tenants in possession, and consider him equally bound by the judgment which Smith obtained. His judgment can, therefore, have no effect to aid his recovery in this action. He cannot couple his possession with that of Conley's heirs, and, by the union, make out twenty years continued adverse possession in himself and those under whom he claims, so as to destroy the right of entry founded on Moore's patent, and to create for himself a right of entry. The retroactive force of Smith's judgment effectually breaks the continuation of the possession under the claim of Hays, and leaves those holding under it destitute of the protection afforded by the statute of limitations.

Where there
is a subsisting

We have failed to discover in the record any foundation for the verdict and judgment, growing out of

the supposed continued adverse possession of those claiming the land in contest under the patents of Hays. Under this view of the case, it is unnecessary to decide whether the deed of partition, as it is called, be sufficient to pass the title from Moore. If it be not, still the claimants under the junior grants cannot prevail against those in possession when there is a subsisting right of entry under the elder grant. Such right of entry subsists here, owing to the manner in which the continuation of the possession has been broken.

There is another ground assumed by Chiles, in support of the verdict and judgment, which must be examined. In August, 1830, Chiles, at a sale made by the sheriff, under a judgment and execution against Hardage Smith, became the purchaser of the land in contest, or the greater part thereof, and, in September, the sheriff executed a deed of conveyance to Chiles. If Hardage Smith, at the time of this sale, had a valid title to the land, under the senior patent to Moore, it would follow that the verdict and judgment, in this action, were right, so far as they affected the land embraced by the sheriff's deed. The appellant, Jones, contends, that Smith had no such title at the time of the sale, because he had, in 1826, conveyed all the land in controversy to him. To this Chiles replies, that the deed made to Jones, in 1826, is void, being in violation of the law against champerty and maintenance, because when it was executed the land was in part possessed adversely by Conley's heirs. To this Jones rejoins, that no part of the deed of 1826 is void, because at the time it was executed, much the greater part of the land was in the actual possession of Smith, or those claiming under him, and because he then had a judgment for the recovery of an unexpired term, covering the lands occupied by the heirs of Conley, and which was afterwards enforced by writ of *habere facias*.

We think the deed to Jones, executed in 1826, is not void under the act of 1824 relative to champerty and maintenance. The object of that act was to prevent speculations in "*pretended*" titles, whereby purchasers were enabled to harrass occupants with law suits. Nei-

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right of entry under the elder grant, there can be no recovery by those claiming under the junior grant.

A sale of land for which the vendor has recovered a final judgment—tho' the land remains in the possession of the defendants, the *he. fa.*, not being executed, — is not within the champerty act of 1824 — the sale is not of a mere "*pretended* title," and is valid.

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ther the letter nor policy of the act embraces a case where the vendor has already litigated the title with the occupants, and obtained a verdict and judgment in his favor, and which have been acquiesced in so long that they are irreversible by the prosecution of a writ of error. A title thus settled by the judgment of a court of justice cannot, with propriety, be called a "*pretended title*." Nor can we perceive any motive or object which could have influenced the legislature to prohibit the sale and conveyance of a tract of land recovered by the final and irreversible judgment of the court, until after the dispossession of the tenants, by the execution of the writ of *habere facias*. We conclude, therefore, that the deed executed to Jones, in 1826, was not void to any extent, and that whatever title Smith then had passed to Jones, and consequently the sheriff's levy and sale were altogether ineffectual. It is unnecessary to consider and decide the question whether a deed of conveyance be totally void when a part of the land is adversely held at the time. If such a deed be good for so much of the land as is possessed by the vendor, and void as to the residue only, then it would follow, in this case, that the purchase of Chiles, at the sheriff's sale, could not operate on, or affect Jones' title to the land, so far as it was actually possessed by him, or his vendor, at the date of the deed.

Quere suggested, whether the sale of an entire tract, part of which is held adversely, would be void as to the whole, or as to the part held adversely: not decided.

From the foregoing view of the case, we think the court ought to have granted a new trial. We deem it unnecessary to enter into a critical examination of the various instructions given and refused. In conducting the new trial, the plaintiff's lessors must shew that there has been with them and those under whom they claim, an unbroken adverse possession in fact, for twenty years, of all the land they recover, otherwise any judgment in their favor will be erroneous. The principles laid down are sufficient to govern the inquiry, without a particular notice of the irrelevant instructions. The court will readily perceive, from what has been said, how each instruction would be disposed of by this court.

Judgment reversed, with costs, and cause remanded for a new trial.

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1834.

Sander's Heirs vs. Jennings and Trueman. CHANCERY.

[Messrs. Sanders and Depew for Appellants: Mr. Robinson for Appellees.]

FROM THE CIRCUIT COURT FOR OWEN COUNTY.

Judge UNDERWOOD Delivered the Opinion of the Court.

April 9.

THE bill in this case was filed, by the appellees, for the purpose of coercing the specific execution of a contract made between Nathaniel Sanders and Jacob Wyant, both of whom were dead at the institution of the suit. The appellees claimed the land under the heirs of Wyant. In the progress of the cause a supplemental bill was filed, from which it appears that the title was in Prentiss and Bouldin. The court rendered a decree directing Prentiss and Bouldin to convey the title to the complainants.

The decree must be reversed, with costs, because Prentiss and Bouldin were not made parties to the suit by the service of process, actual or constructive. After they were made defendants by the supplemental bill, an entry was placed in the order book to this effect:—"This day came the parties, by their attornies, and by consent, the answer of Sanders' heirs is to be taken and considered the answer of Prentiss and Bouldin; and the answer of George and Joshua Wyant to be taken and considered as the answer of Wyant's heirs." The parties who thus consented could be those only who had been brought before the court by service of process, or who had entered an appearance. Prentiss and Bouldin and Wyant's heirs, George and Joshua excepted, were not before the court; and, therefore, the foregoing order did not operate upon them. And hence it was erroneous to make such an order the foundation upon which Prentiss and Bouldin were directed to convey their title. It is absurd for the parties before the court to undertake to enter into agreements affecting the

Parties to a bill in chancery who have not appeared, nor been summoned, are not bound by any agreement made by other parties who do appear. An agreement that the answer of one defendant shall be taken as the answer of another defendant also, can only be the agreement of those before the court, and will not authorize any decree against defendants who have not been served with process—actual or constructive.

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rights of those who are not before the court, and we cannot suffer such a practice to prevail.

The complainants had no cause of action, unless the heirs of Wyant had sold them the land contracted for by their ancestor. The admission of George and Joshua that they had sold their interest to the complainants, did not prove that their co-heirs had likewise sold to the complainants; and George and Joshua had no authority to consent for their co-heirs that such was the fact.

The decree is reversed, with costs, and the cause remanded for proper parties and new proceedings.

2d 38
93 75

EJECTMENT.

Fry, Vaughan et al. vs. Smith et al.

[Mr. McConnell for Appellees: Mess. Morehead & Brown for Defendants.]

FROM THE CIRCUIT COURT FOR FLOYD COUNTY.

April 9

Judge NICHOLAS delivered the Opinion of the Court.

Statement of the
case, as agreed
in the circuit
court.

THIS action of ejectment was brought, in 1819, on demises in the names of John Fry, Joshua Fry, Charles Vancoover, John Vaughan, Charles Vaughan and John Fiott. The land in contest was patented the 15th of December, 1772, by the then governor of Virginia, to John Fry, in consideration of military services rendered under the governor's proclamation of 1754; conveyed by Joshua Fry, his heir at law, to Vancoover, in 1792, and by him, to the Vaughans and Fiott, in 1793.

The land was settled on by Vancoover, in 1788, and the possession held by him, and those claiming under him, for a few years thereafter. Vancoover and Fiott were both natives of Great Britain, never naturalized in this country, and died in England prior to 1818. The patent to Fry stipulates for the payment, by him, of one shilling yearly for every fifty acres after the expiration of fifteen years, by way of rent, and also for the cultivation and improving of three acres, part of every

fifty acres of the tract, within three years from the date of the patent; with a proviso, that if three years of the rent shall at any time be in arrear and unpaid, or if Fry and assigns do not, within three years then next ensuing, cultivate three acres, part of every fifty of the tract, then the estate, thereby granted, to cease and determine, and that it should be lawful for the king to grant the same to other persons.

The conveyance to the Vaughans and Fiott, recites the payment of the whole of the consideration money by the latter, and stipulates that they shall hold in trust for him.

There was no proof that the conditions stipulated by the patent for improvement &c. had been complied with.

The defendants claimed under a Kentucky patent of 1818, issued upon a survey and land office warrant.

Subsequent to the dereliction of the possession by those holding under Vancoover, there had been a possession of sixteen or seventeen years by persons neither having or claiming title, and no way connected with the title of either of the parties to this controversy.

Upon an agreed case, which presented the foregoing facts, the circuit court rendered judgment in favor of the defendants, and the plaintiffs appealed.

All objection to the title of the plaintiffs, on the score of non-improvement and non-payment of the quit rent, reserved by the patent, is answered by the ninth section of the Virginia act of 1777, 1 *Litt. Laws*, 391, abolishing quit rents, and the nineteenth section of the act of 1796, which abolishes all reservations and conditions in the grants from the crown of Great Britain, and which declares no petition for lapsed land shall be received for or on account of any failure or forfeiture made or incurred after the 29th of September, 1775.

As Fiott was dead at the institution of the suit, the recovery, if for any thing, must be restricted to the two thirds, which, by the deed from Vancoover, passed to the Vaughans, in trust for Fiott—the title to the other third having passed, under the deed, to Fiott himself.

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1834.

*Fry, Vaughan
et al.*
vs.
Smith et al.

Quit rents, conditions &c. in grants of land from the crown of G. B. were abolished by an act of Va. of '77, and of Ky. of '96: such grants are not affected by a failure to pay such rents or comply with such conditions. There can be no recovery upon a demise in the name of one who was dead at the institution of the suit.

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1834.

*Fry, Vaughan
et al.*

vs.

Smith et al.

A deed conveying the fee simple of land to the grantee, altho' it contain a declaration that the grantee's name is only used in trust for another, nevertheless passes the legal title to him, and there can be no recovery, at law, in the name of the *cestui que trust*.

It was contended, in behalf of the defendants, that the deed created such a use in favor of Fiott, in the whole tract, as was executed by the statute, and vested the whole title in him. We, however, do not think the deed susceptible of such an interpretation. It is precisely one of that character which the courts have uniformly construed not to fall within the operation of the statute. It grants and conveys the land to the Vaughans and Fiott, to be held by them and their heirs, to their own proper use and behoof, with a declaration on the part of the Vaughans, that their names are used in trust only, and to and for the use of Fiott. The deed does not grant or create a use in favor of Fiott, but barely carries on its face the evidence of what would otherwise have been a mere resulting trust in his favor, as the payor of the purchase money.

This construction supersedes the necessity of going into the question of an alien's right to maintain an action for the recovery of real estate. The trust here is such an one as a court of law cannot notice. In legal intandment, the Vaughans are the proprietors, as well as the legal title holders, of two thirds of the land.

The heirs of Fiott being aliens, as is admitted in the agreed case, the title to the third which he derived under the deed, did not descend to them, but vested in the commonwealth, without office found. This third, it is contended, passed by the patent of 1818, to the defendants; that they thereby became tenants in common with the Vaughans, and there should have been, therefore, proof of an actual ouster. It is a sufficient answer to this position, that the defendants, on entering their appearance, not only confessed the ouster, but the agreed case admits they held the land adversely to the plaintiffs.

The result is that, the plaintiffs were entitled to a judgment for two thirds of the land in contest, and the judgment in bar of their action must be reversed.

But as, according to settled practice, when a judgment is reversed, we are bound to go back to the first error committed to the prejudice of either party, our attention has been called to an alleged error in the com-

In ejectment, the declaration must be filed on the first day of the term to

Lands in this state do not pass by descent to aliens, but vest in the commonwealth, without office found.

Confession of lease, entry and ouster, supercedes the necessity of proof of actual ouster—even where the def't claims to hold as tenant in common with the plff.

mencement of the suit, in failing to file the declaration on the first day of the term, to which the notice made it returnable. The defendants, before entering into the consent rule, moved to discharge the common order, and dismiss the suit, because the declaration had not been returned into court until the third day of the term. It has heretofore been determined that the declaration and notice in ejectment answer the purpose of process, and that, if not returned until the term after that to which they are returnable, it is a fatal defect to the whole proceeding, even after the service and confirmation of the common order. It has also been held, that a motion cannot be acted on at any subsequent day of a term, but is discontinued, unless it were noted of record on the day appointed by the notice. The same principle requires the proceeding in this case to be pronounced erroneous.

The judgment must be reversed, on the agreed case, and the cause remanded, with directions to dismiss the suit, for the irregularity referred to.

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which the notice is returnable. If filed afterwards, it is irregular, & the judgment subject to reversal.

Wells vs. Bowling's Heirs,

and

Bowling's Heirs vs. Wells.

DEBT.

[Mr. W. R. Beatty for Wells : Mr. Hord, and Messrs. Morehead and Brown for the Heirs.]

FROM THE CIRCUIT COURT FOR MASON COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

April 9.

UPON an issue of no assets, to an action of debt against the heirs of Bowling, an agreed case was framed, shewing, in substance, that there was a prior suit against them, by another creditor, for an unliquidated balance

Agreed case.

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1834.

Wells

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Bowling's
Heirs,

&

Bowling's
Heirs

vs.

Wells.

Opinion & judgment of the circuit court.

—the amount claimed being more than the whole amount of assets, if any ; and that, by the will of Bowling's father, there was devised to him and his sister certain slaves, after the death of their mother, who was devisee for life of the whole estate, with directions to pay debts, maintain and school the children ; and that his interest in those slaves, the mother being still alive, is all the assets, if any, that have come to his heirs.—No administration had been granted upon the estate of Bowling ; and more than twelve months after his death had elapsed before the institution of this suit.

Upon this agreed case, the court rendered an opinion, that Bowling took a vested remainder in the slaves, which became liable to his creditors, as assets in the hands of the defendants, as his heirs ; but that the institution of the prior suit gave the plaintiff therein, "a right to have his claim first satisfied," and judgment was thereupon rendered for the debt, "to be levied of the estate of Bowling, which has or shall come to the hands of the defendants, his heirs."

That part of the judgment which goes for present assets, is so palpable a *non sequitur* from the decision of the court, that we presume it must have been the result of inadvertence in entering it up.

The pendency of a prior suit is no bar to a recovery against an administrator or heirs. But the administrator or heirs may in either suit, confess the action to the amount of the assets, and then plead that judgment in bar of the other action

We do not know the principle, upon which the court determined the defendants were exempt from a judgment for present assets, by reason of the pendency of the prior suit. It is not even alleged in the pleadings, or the agreed case, that any part of the sum claimed in that suit is actually due ; and if it had been, still, the defendants could obtain such exemption in no other way than by confessing the first action, to an amount sufficient to cover the value of the assets. A creditor cannot be postponed in recovering his judgment against heirs, merely because another creditor has a prior suit against them, though the heirs may have the privilege, accorded to the personal representative, of confessing the action of either creditor, and then pleading his recovery in bar of the other.

Slaves—though they descend &

There is no pretext for our determining, in this case, the questions that have been mooted in argument, and

which it appears to have been the principle design of the agreed case to present for adjudication ; that is, whether the devise to Bowling lapsed by reason of his death in the life time of his mother, or whether he took such an interest in the slaves as would descend to his heirs. In neither alternative, would a judgment against the defendants, as his heirs, be authorized on the idea of such interest being assets in their hands. For though our statute declares that slaves shall descend to heirs, yet, at the same time, it makes them assets in the hands of the personal representative, and it has uniformly been determined, that the heir acquires an *inchoate* property only, such as gives him no absolute legal ownership, without the assent of the personal representative. The legal title to slaves must, therefore, rest in abeyance, until the appointment of a personal representative, in the same way as does the title to those chattels that are strictly and exclusively personal. The heirs can no more be sued on account of the one than the other, as assets in their hands. Though there had been no grant of administration on the estate of Bowling, at the institution of this suit, yet that is no reason why there may not be hereafter ; and whenever granted, whatever interest of his in the slaves, that either the heirs or personal representative could take, would immediately become the property of the latter, for the purposes of administration ; and the recovery in this suit could neither divest his right, or bar his recovery. The statute authorizing suit against heirs alone, where no administration has been taken for twelve months, creates no new liability against the heir, and makes no new subject of assets ; but merely enables the creditor, in a particular class of cases, to sue the heir alone, without joining the personal representative.

So much of the judgment, therefore, as goes against present assets is erroneous, and so much as goes against

7 Mon. 421,) that there could be no judgment *quando* against heirs, questioned and overruled ; and now held, that—Though the right and title of the heir is cast upon him at once by the death of the ancestor, he may not acquire, or be able to obtain, the possession until long afterwards ; and is liable to the creditors of the ancestor so far only as estate has actually come to his possession. In the mean time, the creditor should have the right to establish his debt, by suit against the heir, and to have his judgment satisfied out of any estate of the ancestor which the heir may thereafter acquire possession of. Judgments against heirs, for assets *quando*, are therefore legitimate, necessary and proper.

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Wells
vs.
Bowling, &c.

pass as real estate, (by statute,) do not vest in the heirs, without the assent of the personal representative, in whose hands they are (by the same statute) assets, and in whose hands only, they can be reached by creditors.—The property of heirs in slaves inherited, does not render them liable to judgment upon the obligation of the ancestor. When there is neither ex' or nor adm. the title to the slaves—like the title to the personal property—rests in abeyance. The act authorizing suits against heirs alone, after 12 months elapsed without the appointment of executor or administrator, does not subject any property in their hands which was not so liable before the statute.

Former decisions of this ct.
(6 Mon. 124—

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&*

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assets *in futuro* is equally erroneous, provided it be true, as has been determined in the cases of *Monroe vs. Wilson*, 6 Mon. 124, and *South vs. Snelling*, 7 Mon. 421, that no judgment *quando* can be rendered against heirs. In the first of those cases, it is said, the court "could not conceive, under what law, or according to what precedent, any such judgment could "be rendered ;"— "for there cannot be a supposed case of assets descending to them from time to time. They (heirs) take at once on the death of the ancestor, or not at all." In the other case, a decree against heirs for assets *quando*, is treated as something ludicrous, because it was providing "for a future supposed descent, an event which could never happen." No authority is cited in support of these decisions, nor is any comment made upon the multiplied precedents in the English books, of judgments *quando* against heirs, or upon the unvarying current of authority in their favor. The only argument used is embraced in the above extracts from the opinions, which is, that there could be no such judgment, because assets do not descend from time to time to the heir, but descend at once on the death of the ancestor. This argument supposes that a judgment *quando* anticipates a future descent, which it does not. It anticipates the possibility of the acquisition of future assets, but not their descent. The administrator and the heir both acquire all their title to the different portions of a decedent's estate, by a single act or operation of the law. The grant of administration giving it in the one case, and the descent in the other. Though the administrator acquires his title to the whole personal estate at one and the same time, and it is not devolved upon him from time to time, yet the law does not render him liable for all that he has thus acquired title to, but only for so much thereof as he may have reduced to possession, supposing always, that though there may not be present assets, yet still they may accrue to him hereafter. So, also, though the title to the whole of the real estate descends to the heir at one and the same time, yet the law holds him liable for only so much as he has got into possession. It may well be, that in point of fact, he nei-

ther has it in possession, nor has been able to reduce it to possession, when he is sued. The law, therefore, by the judgment *quando*, provides for the anticipated event of its being reduced into possession, when it will instantly become assets.

A single instance illustrates and proves such to be the law, as fully and satisfactorily as any number could. For if it can be shewn, that, in a single instance, such a judgment would be useful and necessary, it is plenary proof that the law allows it, and that the numerous precedents of such judgments, in the English books, are as well founded on principle as authority. Such instance is to be found in the familiar case of daily occurrence, where the title to real estate descends to an heir, whilst in the adverse possession of another. Neither a right to enter land, nor a right of action for land, is assets, until brought into possession—*Co. L. 374, b. ; 6 Co. 58, b.*—but of course becomes assets when brought into possession.

The descent of a reversion expectant on an estate tail, is also an instance in England. For though such reversionary interest is not considered assets during the continuance of the intermediate estate, because of the power of the tenant in tail to defeat the reversion, yet if the estate tail expires, the estate thereby vested in the heir as reversioner, immediatly becomes assets in his hands.

A still more familiar case, in England, is that of a reversion expectant, on an estate for life, which, though considered assets, yet the plaintiff there cannot have execution until it comes into possession ; and upon a plea shewing a reversion of that sort, with a *nihil preter*, such is the form of the judgment. 1 *Roll. Abr.* 888 ; *Dyer*, 373, b. ; *Com. Dig. Pleader 2 E.* 3-4-5.

When a creditor sues an heir, to get at assets not sufficient to pay his whole debt, or even merely to establish his debt, before assets have come to hand, there is no reason why he should not be allowed the same judgment as against an administrator, for such assets as may thereafter come to hand. Without such judgment for future assets, he would be effectually barred from ever recovering them. In *Mary Shipley's case*, 8 *Co.* 134,

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where it was held that a judgment *quando* could be rendered against an executor upon a plea of no assets, an heir is treated as standing, in this particular, upon the same footing with an executor, and precedents of such judgments against an heir were cited to prove the propriety of allowing it in that case against an executor. In *Noel vs. Nelson*, as reported in 1 *Sid.* 448, heirs and executors are expressly stated to stand upon the precise same footing in this respect, and so they are treated by Comyn in his digest. In *Dorchester vs. Webb*, *Cro. Car.* 372, the particular point ruled in Mary Shipley's case was denied to be law, though it was admitted that, if the plea confessed some assets, the plaintiff might not only take his judgment for them, but for the residue of his debt, out of future assets. But in *Noel vs. Nelson*, (also reported 2 *Saund.* 226,) the authority of Mary Shipley's case is reasserted, and such has continued to be the law and practice ever since. With us, such a judgment has long been allowed against an executor, even after a verdict for him upon a plea of no assets, and there is no sufficient reason why it should not be allowed against an heir also, under like circumstances. The creditor cannot well be presumed to know the state of the assets in the hands of the heir or executor, and he should not be prejudiced by bringing his suit to establish his debt against the decedent, before assets have come to hand, or after they have been paid away to other creditors. Whether the law, as it still is in England, that neither a reversion, nor a right of entry, or right of action *for land*, is present assets in the hands of an heir, has undergone a change with us, by reason of our statutes subjecting land to sale under execution, whether in possession, reversion or remainder, and even in adversary possession, need not now be determined. For a judgment *quando* would still be proper, let that point be determined either way. The power of avoiding an estate, or taking advantage of a forfeiture of an estate granted upon condition, or the right of acquiring an estate upon the performance of a condition, descending upon an heir, would neither of them be an estate in possession, reversion or remainder, neither would they

therefore be vendible under execution, or constitute present assets in the hands of an heir, though the estate so acquired, would, when acquired, become assets.

The result is, that we deem a judgment *quando* against heirs as still legitimate, necessary and proper, and the judgment rendered here, would be affirmed, if it were strictly of that character. But as we understand it, it is a judgment for assets in *presenti*, as well as in *futuro*, and for that cause it must be reversed, and the cause remanded, for a judgment to be rendered against such estate descended from Bowling as may hereafter come to the hands of the defendants.

Bowling's heirs must recover the costs of both writs of error.

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DETINUE.

[Mr. Turner for Plaintiff: Mr. Caperton for Defendant.]

FROM THE CIRCUIT COURT FOR MADISON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court. April 10.

THIS appeal is prosecuted for reversing a judgment for a slave named Philip, obtained by the appellees, (Bev-
erly Terrel, Napoleon Terrel, and Jerome Terrel,) claiming as residuary devisees of William Terrel, against the appellant, holding under the testator's widow, who claimed the same slave as a devisee (of the same will,) for life.

Statement of the
case.

On the trial, the circuit court instructed the jury that, if the testator owned Philip at the date of the will, he passed to the defendants (now appellees,) by the residuary devise to them, and that the widow derived no right to him from the will.

Instructions of
the circuit court

The only question deemed worthy of serious consideration, is, whether that instruction was right or wrong.

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Clauses of the
will on which
the question to
be decided arises.

So much of the will as may be material in this enquiry is in the following words:—"After the payment of my debts and funeral expenses, I give to my wife—during her life—the following property"—enumerating several articles of his estate, and then proceeding thus—"the following negroes, to wit, Essex, Harry, Dick, Phillis, Sam, Hannah, Cely, Lucy, *Phillis*, Louisa, Ann, Fanny and Mary Jane; and, after the death of my wife, I give to my son, William Terrel, the land whereon I live, and one negro, to be chosen by himself out of all that I have." "I give to my three sons, Beverly, Napoleon and Jerome, after the death of my wife, all of the property I have given to her, as above, except the negro which I have given to my son William, as above mentioned, to be equally divided between them." "I desire that, during the life time of my wife, she, from the products of the farm, negroes, stock &c. do educate and support my three sons, Beverly, Napoleon and Jerome, or until they arrive at the age of twenty one years. I desire that all the balance of my estate, both real and personal, of what value or kind soever that may be, not herein before particularized, may be equally divided between my three sons, Beverly, Napoleon and Jerome all of which I give to them and their heirs forever."

Parol evidence.

On the trial, it was shewn by parol evidence, that, at the date of the will, with the exception of a few slaves in the possession of his married children, and to whom he devised them, the testator owned *precisely the number* of slaves devised to his wife for life, all corresponding in name with those described in that devise, except in one particular only, and that is, that he owned only *one* slave named *Phillis*, but owned *Philip*, who is not expressly mentioned in the will, unless one of the names "*Phillis*" was intended for "*Philip*."

Parol evidence is admissible to show that there is a latent ambiguity in a will, upon the face of which there is nothing apparently ambiguous.

Upon these facts, the counsel for the appellant insists that, a latent ambiguity has been established, and explained sufficiently to prove satisfactorily that, instead of two slaves named "*Phillis*," the testator intended to devise, and did devise, to his wife, one slave named "*Phillis*" and another slave named "*Philip*;" and that,

as he owned only one "*Philip*," (the slave now in controversy,) the appellees are not entitled to him during their mother's life, nor even after her death, which has not yet occurred, until William Terrel shall have chosen the slave devised to him.

On the other hand, the counsel for the appellees objects to the competency of the parol evidence, and relies confidently on the case of *Webb's Heirs &c. vs. Webb*, 7 *Monroe*, 626, as an apposite and conclusive authority.

There is no apparent ambiguity in the devise to the widow. If there be *any* ambiguity in that devise, it must, therefore, be of that class denominated "*latent*," which, depending, as it necessarily does, on facts extraneous to the will, and generally in *pais*, *must*, of course, be established by extraneous proof, and *may* be satisfactorily exhibited and explained by *parol* testimony. This doctrine is too firmly settled to be now shaken or seriously doubted. 3 *Starkie on Evidence*, 1024-5-6; *Ibid*, 1694; and 1 *Roper on Legacies*, 132, 141, 271.

In the case of *Webb's Heirs &c. vs. Webb* (*supra*), there was no latent ambiguity; but the question was—whether a total omission to make a devise could be supplied by parol evidence. That case, therefore, has no application to the facts of this case. An intention to make a will, even though expressed, and however expressed, cannot be a will, unless there be a fraudulent suppression, or unless the law prescribing the mode of making valid wills shall have been complied with. The question in this case is not whether the testator intended to devise to his wife that concerning which his written will is silent, but it is, what is the true import, application or effect of a clause contained in his will? Upon this question there could have been no doubt, had no extrinsic fact been proved. On its face, the will is clear, explicit, and unambiguous. But when it was proved that the testator owned only one slave named "*Phillis*," the manifest consequence was a latent ambiguity as to what slave the testator intended by the reiterated name "*Phillis*;" and to explain or settle that ambiguity, parol testimony was undoubtedly competent. But such testi-

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ous—to explain the ambiguity.—A testator devises to his wife, for life, certain slaves, described in the will by their fifteen names—two of the 15 by the name of "*Phillis*." It appears, by parol proof, that the testator had but fifteen slaves, and only 1 named "*Phillis*"—but had one, not named in the will, called *Philip*. The whole will together indicating that the testator intended that his wife should have all his slaves during her life, it is presumed that "*Phillis*" was inserted in the will, where *Philip* was intended, and so held that *Philip* passed, under the devise, to the widow. But—

A devise not found in a will, cannot be established, or supplied, by parol proof, though it may appear ever so clearly, that it was the intention of the testator to have had such a clause inserted. *Webb's Heirs vs. Webb*, 7 *Monroe*, 626.

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mony, in such a case, should be clear and satisfactory. Is it so here? This is the only question.

If it had been proved that the testator owned only one slave, and that his name was Philip, and if he had devised to his wife a slave named *Phillis*, and Philip had not been mentioned in the will, then, though the devise to the wife would have been unambiguous on its face, nevertheless the proof of the extraneous fact, that he owned no slave named *Phillis* would have created a latent ambiguity as to the slave intended by the testator; and the proof of the fact that he owned only one slave, and that the name of that slave was *Philip*, would, unquestionably, have been sufficient, according to both reason and authority, to shew satisfactorily that, by "*Phillis*," the testator intended "*Philip*."

A latent ambiguity may arise as to the identity of either the legacy or the legatee—the thing devised or the devisee; and if, as has been settled by authority, 2 *Pr. Wms.* 140, parol testimony be sufficient to shew that a devise to "*Catharine Earnley*" was intended for "*Gertrude Yeardley*," surely the hypothetical facts just stated would be sufficient to prove that Philip was intended to be devised by the name "*Phillis*," substituted through inadvertence or mistake.

The only difference between the supposititious and the actual case, or between the case supposed and this case, is, that, in the former, the testator had but one slave and devised but one, and, in this case, he had several and devised several, and, therefore, *possibly* he intended not to devise to his wife as many, *by one*, as are enumerated by name in the devise to her, and the person who drew the will may have inadvertently and erroneously written "*Phillis*" twice, and thus inserted fifteen instead of fourteen names. This may be possible, but it is not probable; and if we can ascertain with satisfactory certainty that there is no mistake in the number, the legal consequence must be, that the mistake was in writing "*Phillis*" once, instead of "*Philip*," and therefore that "*Philip*" passed by the devise to the wife, and not by the residuary devise to the appellees.

That the mistake was in the *name*, and not in the *number*, is, *we think*, satisfactorily evinced by the following among other less important considerations. *First*. It is more probable that the testator, when he read the will, or when it was read to him, confounded "*Phillis*" with "*Philip*," than that he failed to observe that the clause contained one more slave than he intended to devise, and that "*Phillis*" was written twice. *Second*. It is remarkable that, if the testator intended to devise to his wife a part only of the slaves in his possession, the clause, written and adopted for that purpose, should contain precisely as many names as the whole number of the slaves then in his possession. *Third*. It is unreasonable to suppose that, if the testator had devised Philip to the appellees, he would have given to his son William the option to choose, *after his mother's death*, one slave out of all his (the testator's) slaves. But it is reasonable and altogether consistent to presume, that the testator supposed that he had devised all the slaves to his wife during her life, and, therefore, in the devise of a slave to William, said that he might, "*after his mother's death*," make choice out of all the slaves. *Fourth*. It seems that the testator intended that the appellees, who were all then minors, should live with their mother, and be reared by her to maturity, and that as much of the profits of the estate devised to her as might be necessary for that purpose should be appropriated to their education and maintenance. Is it probable, then, that he intended that she should have the use of only fourteen of his fifteen slaves, and that Philip *only*, a small boy, should be exempted, and should go immediately, and *jointly*, to the three infant children, who were to live with their mother and be sustained by her and at her expense, and who, at her death, were to have all the slaves except one, and much of the other estate devised to her during her life?

The more rational and consistent deduction from the extraneous facts, and from the will, when properly considered, compared altogether and made to harmonize, is, that Philip was included in the devise to the widow. It seems to us, that any other deduction would be arbi-

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tending to elu-
cidate the inten-
tion of the testa-
tor and explain
the ambiguity
shown to exist
in the will.

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trary and incongruous, and could not be sustained by principle or by analogy.

Upon such a question as that we are now considering, it is unusual and would be unprofitable and inappropriate in a judicial opinion, to enter into a minute and elaborate analysis of all the facts, arguments and authorities that would directly or remotely tend to establish the proper legal conclusion, or to elucidate or fortify the opinion of the court. The general view presented in the foregoing outline, is deemed sufficient to shew, with a certainty as satisfactory as either reason, authority, or policy requires, that Philip, the slave now in controversy, passed by the will of William Terrel, senior, to his surviving wife, during her life. Consequently, the instruction given to the jury, by the circuit judge, must be deemed erroneous.

Wherefore, the judgment of the circuit court must be reversed, the verdict set aside, and the cause remanded for a new trial.

MOTION.

Fowler vs. Currie et al.

[Mr. Richardson for Appellant : Mr. Chinn, Messrs. Wickliffe & Wooley for Appellee.]

FROM THE CIRCUIT COURT FOR BOONE COUNTY.

April 10.

Judge UNDERWOOD delivered the Opinion of the Court.

When a writ of *habere facias* is executed, the judgment is satisfied: any subsequent *habere facias* on the same judgment, is illegal, and may be quashed.

If the plaintiff in a *ha. fa.* is

JOHN DEN, as lessee of Fowler, obtained a judgment, in May, 1820, for his term yet to come in and to an undivided moiety of five hundred acres of land mentioned in the declaration. In 1823, a writ of *habere facias* issued upon this judgment, and was executed by the sheriff; who, according to the command thereof, delivered possession of a moiety of the tenements to the lessor, Fowler. In 1830, Fowler, in the name of John Doe, as lessee, sued out a second writ of *habere facias*,

and in virtue thereof, the sheriff put said Fowler into possession of various tenements occupied by other persons than those who were subjected to the writ of 1823. In executing this last writ, the sheriff turned no tenant out, but he put Fowler in as a co-tenant.

On the motion of Currie &c. this second writ of *habere facias* was quashed, and a writ of restitution awarded. Whether the court acted correctly in quashing the second *habere facias*, and in awarding restitution, are the questions presented for revision.

We think the second *habere facias* was properly quashed. It satisfactorily appears, that Fowler, by the execution of the first *habere facias*, was put into possession of the moiety of the land recovered. By such delivery of the possession, his judgment was fully satisfied, and thereafter, he could no more have another writ of *habere facias*, than a plaintiff could have a second *feri facias* after making the amount of his judgment upon the first.

If the possession delivered under the first *habere facias* is invaded, Fowler must seek redress by writ of forcible entry, or by ejectment. His adversaries will thereby have an opportunity to be heard. He cannot redress himself against them by a new *habere facias* on a satisfied judgment.

We perceive no error in the judgment for restitution. Its effect is to place the parties in *statu quo*. There they should be placed whenever the process of execution has been improperly used to gain an advantage, or to the prejudice of a party who is not, or ought not to have been, bound by the judgment.

We deem it useless to notice minor questions in the cause.

Judgment affirmed, with costs.

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disturbed, after being put into possession, his remedy is by a writ of forcible entry, or ejectment.

Parties ousted by execution of an illegal process, are entitled to a writ of restitution—by which all may be placed in *statu quo*

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CHANCERY.

O'Bannon *against* Roberts' Heirs.

[Mr. Monroe for Plaintiff: Mr. Richardson for Defendants.]

FROM THE CIRCUIT COURT FOR SHELBY COUNTY.

April 10.

Judge NICHOLAS delivered the Opinion of the Court.

The administrator and heirs cannot join in a suit for rents of the decedent's land: the rent accrued in decedent's life time, belongs to the adm'r, who has his cause of action for it: that accrued after his death belongs to the heirs, who have a separate cause of action for it.

A tenant having married the daughter of his landlord, is told by him, after the expiration of the lease, & without any new stipulation for rent, that he may continue to occupy the land: held that he is not liable, under this permission, for any rent, accrued while the father in law lived.

One coparcener may be made liable, in chancery, to the others, for their

THE heirs and administrator of Roberts filed their bill against O'Bannon, to recover compensation for the use of a small tract of land, which descended to them and the wife of O'Bannon, from Roberts, their father, and which O'Bannon had occupied since his death, and for some years previous thereto. The occupancy, during the life time of Roberts, they allege to have been under a lease, the terms of which they do not know, and require a discovery.

O'Bannon answered, that he originally took possession under a lease from Roberts, but that before its expiration, having married his daughter, Roberts authorized him, after its expiration, to retain the possession, without any stipulation as to rent, and he so held at his death. He makes his answer a cross bill against the complainants, asserts a claim for improvements made by him on the land, and for his distributive share of the rents due by some of the other heirs, for portions of the real estate of Roberts, that had been used and occupied by them since his death.

Subsequently, the heirs of Roberts alone, without his administrator, filed another bill against O'Bannon, stating the occupancy of the land by him, as alleged in the first suit, and referring thereto; also, that he had continued to occupy the land from the institution of the first to that of the second suit, and pray for general relief to the extent they may be entitled.

The two suits were amalgamated and tried together, by consent, and the circuit court decreed in favor of the

complainants, the ascertained value of the rent of the land from the time of Roberts' death, after deducting the amount of some improvements made by O'Bannon, but without any abatement for his share of the value of the rent of other lands of the decedent, which some of the complainants admit they were in possession of.

The first suit contains a misjoinder of parties. The alleged causes of complaint in favor of the administrator and the heirs were separate and distinct, and could not properly have been joined together in the same bill. For all the rent due in the life time of Roberts, the cause of action was exclusively in the administrator. For all that accrued after his death, it was exclusively in the heirs, whether based upon actual lease, or for mere use and occupation. But this defect, we think, is cured by the second suit, which is in the names of the heirs alone, and contains allegations and prayer substantially sufficient to sustain the decree, provided O'Bannon be liable at all for his use and occupation. As the manner of his holding rests exclusively upon his own admissions, he cannot be treated or considered as in the attitude of a renter after the death of Roberts.

There is a surprising dearth of authority in the books, as to the responsibility of a parcener to his co-parceners for rents and profits. The absence of such responsibility at common law, from one joint tenant, or tenant in common, to his co-tenants, is distinctly stated and recognized by all the books. But none of the standard authorities, so far as we have been able to ascertain, intimate any opinion whether parceners come within the same rule or not. No sufficient reason is perceived why they should not. In neither case was the want of legal liability owing to a supposed want of right on the part of the parcener kept out of possession, but rather to a defect of legal remedy. The only common law remedy, applicable to the case, was the action of account, which did not lie against any but guardians, bailiffs, receivers, and in favor of trade between merchants. Nor did it lie against the personal representatives of guardians, bailiffs and merchants until the statutes of 23d, 25th and 31st of Edward III. extended

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shares of the rents and profits of any part of the land which he exclusively occupies: and he, being sued by them, may have his cross bill for his share of any land occupied by them to his exclusion; have the benefit of a set-off, and the costs of his cross bill.

An adm'r and heirs having filed bill for rents- the joinder being improper; the heirs afterwards file a separate bill, for rents accrued after the filing of the former (irregular) bill, to which they refer: on the hearing of both suits amalgamated, the first is properly dismissed, with costs, for the misjoinder: but the heirs, upon their separate bill, referring to the former joint one, have a decree for the whole amount shown to be due them by both bills.

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it to the executors and administrators of merchants, and the statute 3d and 4th Anne extended it to the personal representatives of guardians and bailiffs. This latter statute also, for the first time, gave the remedy as between joint tenants and tenants in common. Yet it is said, 1 *Eq. Ca. Abr.* 5, that, prior to this statute, remedies for or against the executors and administrators of guardians, bailiffs and receivers, or for and against joint tenants, tenants in common, their executors and administrators, were usually had in chancery. See also, *Comyn's Dig. title Chancery*, 2 A 1-3, V 6; and 2 *Fonbl.* 184. Thus we find, in the two cases which happened in the reign of Charles I., *Dean vs. Wade*, and *Drury vs. Drury*, 1 *Chy. Reps.* 42-49, that one of two co-heirs was made to account to the other for a moiety of the profits.

The Virginia statute of 1748, 1 *Dig.* 267, is a transcript of the statute 3d and 4th Anne, and like it, though it gives the action of account as between joint tenants and tenants in common, yet no mention is made of parceners. This court, however, in the case of *Graham vs. Graham*, 6 *Mon.* 562, enforced an account of rents and profits, as between parceners, by bill in equity. The authorities referred to, in connection with the manifest fitness and propriety of some such remedy, do, we think, sufficiently sustain the power of so doing.

O'Bannon was entitled to relief on his cross bill in the first suit, for his share of the value of the occupancy of the land, admitted by some of the complainants to have been held by them; and, as the two suits were consolidated, the extent of relief to which he was entitled on that score, should have been ascertained and deducted from the amount to be decreed against him.—He should also be allowed costs on his cross bill, and the bill of complainants, in the first suit, dismissed with costs.

Decree reversed, with costs, and case remanded, with directions for a decree and further proceedings pursuant to this opinion.

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1834.

Coghill's Heirs vs. Burriss.

Scire Facias.[Messrs. Sanders and Depew for Plaintiffs : Messrs. Morehead and Brown
for Defendant.]

FROM THE GENERAL COURT.

Judge NICHOLAS delivered the Opinion of the Court.

April 10.

To a *scire facias* to revive a judgment in ejectment, the defendant pleaded, that, more than twenty years after the rendition of the judgment, and fourteen years after the expiration of the original demise, the plaintiffs, by an *ex parte* motion, obtained an order of court extending the demise to forty years. Upon a demurrer to this plea, the court rendered judgment in bar of the *scire facias*.

The demise can not be extended after a judgment in ejectment.

An order extending the demise made after the judgment, and *ex parte*, is not merely voidable, but void.

A *scire facias* to revive a judgment in ejectment, may be met and defeated, by a plea, showing that the demise was extended by an *ex parte* order, after the judgment.

The only question is, whether the order of court, extending the demise, is void.

It has long been settled by this court, that the demise cannot be extended after judgment in ejectment. This course of decision was earnestly assailed in argument, and the court invited to a revision of the principle and authority upon which it is based. After having made that revision, we think it well sustained by the weight of ante-revolutionary English cases, and in perfect consonance with the great leading principle governing the whole doctrine of amendments: that is, that there must be something to amend by.

The court having no power to make such amendment, there can be little doubt that the *ex parte* order making it in this case, is void, and not merely voidable. It stands upon the same footing with all judgments against a party without notice, actual or constructive, which have always been treated as absolutely void.

We perceive but little weight in the idea, that the defendant should be considered as still in court, and bound to notice every thing done in relation to the judgment

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against him, twenty years after the rendition of the judgment, and fourteen years after the expiration of the demise. We can find nothing either in the principles of law or justice to warrant such an extension of the doctrine of implied or constructive notice.

Judgment affirmed, with costs.

EJECTMENT.

Marshall vs. Goodwin et al.

[Mr. Marshall for Appellant : Mr. Sanders for Appellees.]

FROM THE CIRCUIT COURT FOR OWEN COUNTY.

April 11.

Chief Justice ROBERTSON delivered the Opinion of the Court.

The deed of a large tract of land (sold under the directions of a will) contains a reservation to this effect—"It is also understood that he (testator) may perhaps have disposed of about 800 acres"—"if such shall turn out to be the fact, 800 acres thus conveyed, are excepted." Upon the trial of an ejectment by the grantee against tenants in possession of part of the land, it appears that they had held about 800 acres for a long time, 29 years, claiming it under some contract made with the

RICHARD ADAMS, of Virginia, who died sometime in the year 1800, published his last will, in which, among other devises, he devised to his executors and to the survivor or survivors of them, his lands on the western waters, to sell for the payment of debts.

The persons whom he had nominated as his executors having refused to act as such, an administrator with the will annexed was appointed by the proper court of the county in which the testator had lived and died.

Afterwards, in February, 1824, the county court of Owen county, in this state—in which county a tract of twenty thousand acres, included in the devise to the executors, then lay—made an order for appointing Samuel Tod administrator with the will annexed of Richard Adams; and Tod, as administrator, made a conveyance, in June, 1824, to John J. Marshall, of the said twenty thousand acres, with the following exceptions:—"It is understood, however, that said Richard, in his life time, sold and conveyed, or gave his bond to convey, about three thousand nine hundred acres of said land—two thousand five hundred to William May, and one thou-

sand four hundred to Robert Andrews. It is also understood, that he may perhaps have disposed of about eight hundred acres more, or that about that quantity has been conveyed in compliance and performance of a contract of said Richard: if such shall turn out to be the fact, eight hundred acres thus conveyed, together with the three thousand nine hundred, are excepted."

Some time between 1800 and 1803, one Goodwin settled within the boundary of the twenty thousand acres, claiming about eight hundred acres thereof, which had been set apart for him, in consequence of a contract of sale made with Samuel G. Adams, one of the testator's sons. Goodwin retained the continued and undisturbed possession of the land thus designated, until his death, and the defendants, claiming under him, have enjoyed the like possession ever since.

In 1827, John J. Marshall brought an action of ejectment against Alice Dean, Goodwin and others; for the purpose of obtaining the possession of the tract of about eight hundred acres which had been claimed and occupied as just described. Verdict and judgment having been rendered against him, this court reversed the judgment, and remanded the case for a new trial, because the circuit court had erroneously permitted *Tod* (Marshall's vendor) to testify that the land in contest was the tract of about eight hundred acres referred to in the exception in his deed to Marshall.—See the case as reported, 4 *J. J. Mar.* 583.

On a trial after the return of the case to the circuit court, the defendants obtained another verdict without *Tod's* testimony; and a court having overruled a motion for a new trial, this writ of error is prosecuted to reverse the judgment rendered on the last verdict.

Whether, as the record does not shew that the will had been proved or admitted to record in Owen county prior to the grant of administration to *Tod*, the county court of Owen should be deemed to have had jurisdiction; or whether, if it had jurisdiction, the devise to the executors should be construed as vesting the legal title in the persons named as executors, even though they refused to act as executors, and whether, therefore,

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testator's son, as his agent: from these facts, in the absence of proof that any other 800 acres had been disposed of by the testator, the jury might infer that the land in controversy constituted the exception in the plaintiff's deed; and their verdict, especially a second one, for defendants, should not be disturbed.

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an administrator, *cum testamento*, could legally sell and convey, are questions which might be properly considered in this case. But we will waive them, as we are of the opinion that, conceding Tod's legal power to convey, the jury might have inferred, from all the proof, that the land in controversy was embraced in the exception in the deed.

It is evident that the parties to the deed had some reason to believe that, a tract of about eight hundred acres had been sold or "disposed of" by Richard Adams, or with his sanction and under his authority, and that a conveyance had, perhaps, been made by his representatives. The defendants, or some of them, claiming, under Adams's title, the land now in controversy, were residing on it at the date of the conveyance to Marshall. There is no proof or intimation that any other tract of about eight hundred acres had been sold or was claimed. Samuel G. Adams (Richard's son) had made the contract with Goodwin, and promised to have Richard's title conveyed to Goodwin. It does not appear that the contract with Samuel was made since the death of Richard, and it is not material whether it was in writing or not, as the *fact* of sale by Richard, or with his sanction, is all that is essential. These facts, combined with the important circumstance that Goodwin and those claiming under him had claimed, by contract of purchase, and had peaceably occupied, cultivated and improved, under the title of Richard Adams, the tract of about eight hundred acres for at least twenty nine years at the time of the last trial, and for at least twenty four years prior to the institution of this suit, authorized the jury to presume that Samuel G. Adams had sold the land for or with the authority of his father, and that the tract thus sold, claimed, and occupied, was the tract of about eight hundred acres intended by the exception in the deed. At all events, this court, under all the circumstances, does not feel at liberty to set aside a second verdict for the defendants upon such facts as those exhibited on the last trial.

Judgment affirmed.

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Madison's Executors and Heirs *against* Wallace's Executors and Others.

CHANCERY.

[Messrs. Morehead and Brown for Plaintiffs : Mr. Crittenden and Mr. Haggin for Defendants.]

FROM THE GENERAL COURT.

Chief Justice ROBERTSON delivered the Opinion of the Court.

April 11.

THE only question presented in this case, is, whether the general court erred in sustaining a demurrer to an answer, in the nature of a cross bill, which was filed in 1832, by the executors and heirs of Thomas Madison, deceased, against the executors and heirs of Caleb Wallace, deceased, and the executors and heirs of William Logan, deceased, in a suit in chancery then pending in the said court, and which had been remanded by this court, in 1828, for further proceedings.

The case of *Madison's Executors &c. vs. Wallace's Executors*, 2 J. J. Mar. 581, will furnish a history of the case in the general court, until the decree of that court, in favor of Caleb Wallace against Madison's executors and heirs, for five thousand dollars, with interest and costs, was reversed, and the case was remanded.

The answer, in the nature of a cross bill, which the executors and heirs of Madison filed in 1832, alleges, among other things, that Caleb Wallace, who died in the year 1814, had, in his life time, collected from them a part of the sum for which he had, in 1820, obtained the decree against them ; and that, after his death and before the reversal of the decree, they had paid the residue to William Logan, who was one of his executors, and to whom he had devised the benefit of the decree ; that, after the decree had been reversed, and the case remanded, the executors of Wallace, apprehending that, according to the principles settled by the opinion reversing the decree, they could never obtain another decree for as much as had been collected, had failed to re-

The question—upon demurrer to a cross bill, filed, after a reversal and return of the case, to compel a revivor—comp't having died—for restitution of payments made under the erroneous decree, &c. 2 J. J. M. referred to, for a history of the original suit.

The cross bill filed, & its contents.

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ecutors &c.*

vive or to prosecute the suit in the general court, and, therefore, the answer prays that the suit be properly revived and prosecuted to a final hearing; that, if it shall be so prosecuted, and another decree shall be rendered against the executors and heirs of Madison, for a sum less than that which was first decreed, and which had been paid, the difference between the two sums should be restored to them; and that, if the suit should not be thus prosecuted, or being so prosecuted, there should be no decree against them, the court would decree to them restitution, from some or all of the parties to the cross bill, as should, upon a full investigation, be deemed most equitable.

Objections to
the cross bill.

Three principal objections are urged in this court against the cross bill: *first*, that it contains no equity: *second*, that the general court had no jurisdiction over it: and, *third*, that it improperly joins parties who ought not to be joined, and does not make the proper parties.

Neither of these grounds is sufficient, in the opinion of this court, for sustaining the decree on the demurrer.

An erroneous decree having been satisfied, and afterwards reversed, the defendant is entitled to restitution—for which he, or his executor, heirs and devisees, or the representatives of a devisee who collected the decree, or part of it—are liable. That the bill does not show how much was collected by each, or either of them, is not ground for demurrer—that may be shown by the answers and proofs, and the court may, by its decree, settle the liabilities and rights of all parties.

First. If, as alleged, the plaintiffs in error paid to Caleb Wallace, or to his executors or devisee, the amount of the decree prior to the reversal, and in consequence of the decree, and not in consequence of a fair compromise of the matters then in controversy, there can be no doubt (unless something exist to the contrary, not inferrible from the cross bill,) that either the representatives of Wallace or those of Logan, or both, should make restitution, either in kind or in value. The bill is not as specific and precise in its allegations as (to have been perfectly satisfactory) it should have been. It does not state whether the heirs, or executors, of Madison satisfied the decree; nor whether it was discharged in money, in land, or how; nor does it state precisely how much was paid to Logan. Nevertheless, it imports that the amount of the decree was paid by the executors and heirs of Madison, and to Wallace and to Logan as his devisee and executor; and we do not consider it indispensable that the allegations should be more explicit. Answers to those allegations, and proofs which may be taken under them, may exhibit the whole truth in such a

light as to enable the court to do exact justice between all persons concerned. And in such a case, we cannot doubt that a court of equity may take cognisance of the matters set forth in the cross bill—for the purpose of making restitution, and of equalizing justice between the executors and heirs of Madison, as well as the executors, heirs and devisees of Wallace.

Second. After the reversal of the erroneous decree, the court which rendered it had unquestionable power to order restitution of any money that had been coerced or been paid in consequence of the error of the court; and, as the case in which the erroneous decree was made had not been disposed of in the general court, an answer in that case, filed as a cross bill, was an appropriate mode of applying for restitution. But the object of the cross bill is not to obtain restitution merely as such, but also, and in the first instance, to shew new matter occurring since the date of the decree which has been reversed, and which new matter will prevent the defendants in error from obtaining another decree in the further progress of the case under the opinion and mandate of this court. At law, such matter should be pleaded as in a plea *pais darrein continuance*: in chancery it may be the subject of a cross bill. *Cooper's Equity*, 86.

The death of Wallace presented no obstruction to the filing of the cross bill: *first*, because his death occurred prior to the reversal of the decree, and his representatives, being parties in this court, were parties in the general court after the case had been remanded to that court for further proceedings: *second*, because, had Caleb Wallace died since the return of the case to the general court, and thereby the suit had abated, nevertheless, a cross bill to revive and to obtain ultimate reparation for the loss imposed by the error of the general court, would have been allowable and proper. Usually the cross bill and the original progress *parri-passu* and are heard together. But, if the original be permitted to abate, and a cross bill be filed before a revivor, the cross bill may be heard first and by itself. *Cooper* (p. 88) and be heard before the original bill, or without any revivor of the latter.

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The court that rendered an erroneous decree, has, after a reversal, power to order restitution. If the cause, being remanded, is still pending, the restitution may be applied for by a cross bill—in which new matter of defence may also be introduced, to defeat, or diminish the complainant's recovery.

All parties to a cause in the court of appeals, continue to be parties in the court below, when the cause is remanded, and need not be summoned.

If a complainant dies, pending a suit, and his representatives fail to revive it—the defendant, or his representatives, may, nevertheless, file and maintain their cross bill, which may proceed.

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ecutors &c.*

All joint defend-
ants to an ori-
nal bill, may
properly unite
in a cross bill.

says—"an original bill being abated and not being re-
vived *until after a cross bill was filed* has been held there-
by to lose its priority." Thus shewing that a cross
bill may be filed after the original shall have abated by
death, and before it shall have been revived.

Third. Nor is there any misjoinder, or fatal nonjoin-
der, of parties; as the executors and heirs of Madison
were joint defendants in the suit in the general court,
and were jointly liable to the decree, it was proper for
them to unite in filing the answer in the nature of a cross
bill.

To a bill for re-
stitution of pay-
ments made un-
der an errone-
ous, reversed
decree—the cre-
ditor having di-
ed - his ex'ors,
if he, in his life
time, or they,
after his death,
collected any
part of the mo-
ney, are proper
deft's; so also,
is a devisee of
the decree, who
collected part of
it, or his ex'or
and heirs; so
also, are all the
heirs and devi-
sees of the par-
ty who recov-
ered the erro-
neous decree.

Wallace's executors were proper parties, because Wal-
lace obtained the decree, and devised it by his will; or
because he collected a part of the sum decreed to him;
or because it was collected by his executors or with their
consent—at least, these facts, or some of them, must be
inferred from the allegations of the cross bill. Logan's
representatives were certainly proper parties, if, as al-
leged in the cross bill, he collected a part of the five
thousand dollars and appropriated it to his own use as
the devisee. Had they not been made parties, Wal-
lace's representatives would have had good cause for
objecting to the cross bill. And certainly, the plaintiffs
in error had a right to make the heirs or devisees of
Wallace also parties, and we cannot decide, from the
cross bill, whether they should be styled heirs or devi-
sees, or both. It might have been more *regular* to have
made Gholson and Baker parties, but the omission is no
cause for general demurrer. We cannot perceive what
necessary party has been omitted.

Wherefore, it seems to us, that there is no essential
misjoinder or nonjoinder of parties.

Being therefore of the opinion, that the cross bill con-
tains equity, *prima facie*; that the general court has ju-
risdiction, and that there is no essential defect in parties,
the decree of the general court, sustaining the demurrer
to the cross bill, is deemed erroneous.

Wherefore, it is decreed and ordered, that said de-
cree be reversed, and that the cause be remanded for
further proceedings consistent with this opinion, and for
such final decree on the original bill (*if it shall be prose-*

cuted) and on the cross bill (whether the original shall be prosecuted or not) as, from the ultimate aspect of the case, shall seem to be equitable as between all parties concerned. What that final decree should be—whether for or against the plaintiffs in error, or, if for them, to what extent, or in what mode, or against whom, or to what extent, or in what mode, this court cannot foresee or direct—as the whole case may depend on facts hereafter to be disclosed, and which are not intimated in the cross bill.

The plaintiffs in error must have a decree for their costs in this court.

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1834.

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vs.
Reid.

Sumrall et al. vs. Reid.

DEBT.

[Mess. Morehead and Brown for Appellants: Mr. Crittenden for Appellee.]

FROM THE CIRCUIT COURT FOR MASON COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

April 11.

2d	65
104	814
2d	65
117	791
Dana	
2d	65
120	484
2d	65
124	484

SUMRALL AND MURPHY, in 1821, obtained a judgment at law, by confession, against Waters, for two thousand two hundred twenty eight dollars ninety seven and a half cents, with interest and costs. The judgment not having been satisfied, Sumrall and Murphy filed a bill in chancery to subject a lot in Minerva to sale, for its satisfaction, claiming a lien on the lot in virtue of a mortgage. Ward and Chiles were made defendants to the bill, as they set up claim to the same lot. In 1825, the court rendered a decree, so much of which as affects this controversy, is in the following words:—"It is decreed and ordered, that Richard L. Waters pay to

An app. bond, in legal form, binds the surety to pay the amount of the judgment or decree appealed from, with costs and damages, in case of affirmation. — But a decree upon a bill to subject an equitable interest to the payment of a judgment—which orders the defendant to pay

it by a given day, and directs a sale of the property to be made, upon his failure to comply with the order, is not a decree for the debt. And a bond, executed upon an appeal from such a decree, conditioned that the appellant shall prosecute the appeal with effect, or pay "the amount recovered by the decree," does not bind the obligors to the payment of the debt—as, that being otherwise established, the decree only makes the equitable interest liable for its payment.

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the complainants, on or before the 1st of May next, the amount of their judgment at law mentioned in the bill, together with the interest and costs ; and on his failing so to pay said sums of money, it is decreed and ordered, that Thomas T. Worthington be appointed a commissioner, and having advertised the mill and lot in the town of Minerva, now in controversy, for sale &c. shall proceed to sell &c." From this decree the defendants prayed an appeal, and Walker Reid, as their surety, became bound in an appeal bond to Sumrall and Murphy, in the penalty of three thousand dollars, with a condition annexed to this effect: that, as Sumrall and Murphy had obtained a decree against Waters &c. in the Mason circuit, in the following words, to wit, (here the decree is copied :) " Now, if the said Richard L. Waters, Charles Ward and David Chiles shall well and truly prosecute the said appeal to effect ; or, in case the said decree shall be affirmed, shall well and truly pay and satisfy the amount recovered by the said decree, and shall also pay and satisfy all such damages and costs as shall be adjudged to the said Joseph R. Sumrall and William Murphy, in consequence of said appeal, then the above obligation to be void, otherwise to remain in full force and virtue."

The present is an action of debt brought by Sumrall, as survivor, against Reid, upon the appeal bond. The declaration assigns breaches in the nonpayment of the amount of the judgment at law, and in the nonpayment of the costs adjudged by the court of appeals, upon the affirmance of the decree, and the failure on the part of the appellants to prosecute the appeal with effect. A verdict and judgment having been rendered in favor of Reid, and a motion for a new trial overruled, Sumrall seeks a reversal in this court.

Sumrall contends, that Reid is liable upon the appeal bond, for the amount of the judgment at law, and this is the principal question in the cause. The extent of the obligation imposed by an appeal bond executed in conformity to law, and the stipulations it should contain, were considered and determined by this court in the case of *Moore vs. Gorin*, 2 Litt. 187. According to that

case, the surety is liable, in case of affirmance, for the amount of the judgment from which the appeal is prayed, as well as the damages and costs occasioned by the appeal. It is insisted that the decree appealed from adjudged two thousand two hundred twenty eight dollars ninety seven and a half cents to the plaintiff, and, consequently, that Reid, the surety, is liable for that amount. If the premises were true, the conclusion would be correct. But we are of opinion, that the decree appealed from did not adjudge any sum of money (unless it might be the costs of suit,) against Waters, or any of the appellees. The object of the bill was to enforce a lien, and thereby to secure a sum for which judgment had been rendered. The decree subjected the lot, according to the prayer of the bill, and beyond that there was nothing to be accomplished. When the object of the bill is regarded, there is no difficulty in construing that part of the decree which requires Waters to pay the amount of the judgment at law on or before the 1st of May. It is not another judgment or decree for an equal amount of money, for and upon which an execution could be sued out, but it is a mere requisition that an existing judgment shall be satisfied at that time. The failure to perform the requirement is made the basis on which the sale of the lot is directed. The condition of the appeal bond, therefore, which requires Reid, on affirmance, to "pay and satisfy the amount recovered by the decree," does not impose any liability for the judgment at law.

As to the costs and damages claimed in the declaration, it appears, by an inspection of the opinion of the court of appeals, that none were given. The averments of the declaration on this subject were not sustained by proof. The plaintiff made out no cause of action.

Wherefore, the judgment is affirmed, with costs.

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1834.

Sumrall et al.
vs.
Reid.

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1884.

EJECTMENT.

Redman *et al.* vs. Sanders.

[Mr. Monroe and Messrs. Morehead and Brown for Appellants : Mr. Sanders for Appellee.]

FROM THE CIRCUIT COURT FOR GRANT COUNTY.

April 11. Judge UNDERWOOD Delivered the Opinion of the Court.

The facts of the case.

On the 30th of July and 2nd of August, 1831, the declaration and notice were executed upon the tenants in possession. On the 26th of July, 1831, Ann T. Sanders, the only lessor who had title, conveyed the land, by deed of mortgage, to Theobald and Davis. The title vested, immediately on the execution of the mortgage, in the mortgagees, by the terms of the deed, and was to revert, upon the payment of the money secured by it, in one year. At the time of the execution of the mortgage, the defendants were in the adverse possession of the land. The only questions which we shall notice grow out of the foregoing facts.

The lessor of the plaintiff in ejectment must have title at the commencement of the suit, as well as at the date of the demise.

Service of the declaration and notice in ejectment, is the commencement of the suit.

It is contended by the appellants, that the verdict and judgment for the appellee cannot be sustained, because the title was in Theobald and Davis at the commencement of the suit. There is no doctrine better settled than that the lessor of the plaintiff in ejectment must have title at the commencement of the suit. The service of the declaration and notice upon the tenants in possession, is the commencement of an action of ejectment. The demise laid in the declaration is dated in September, 1830, and three days after the demise, the ouster is alleged to have been committed. The counsel for the appellee insists that, title at the date of the demise and ouster, as laid in the declaration, is sufficient. In this he is clearly wrong. It is true, that the lessor must have title at the date of the demise. *Cox vs. Joiner*, 3 Bibb, 297. *Anderson vs. Turner*, 3 Marshall, 134. But these cases will not allow a plaintiff to lay his demise at a time when the lessor had title, and thereaf-

ter to recover without title. There must be title in the lessor both at the date of the demise and commencement of the suit. The action is pending from the time of the service of the declaration and notice. *Taylor &c. vs. Taylor &c. 3 Marshall, 20.*

If, then, the mortgage was effectual to pass the title of Ann T. Sanders to Theobald and Davis, the verdict and judgment cannot be sustained, unless the case of a mortgagor forms an exception to the general rule. That it does not, so long as the mortgage money is unpaid, was decided in *Dougherty vs. Kercheval, 1 Mar. 52.* There is no ground for the supposition that the mortgage was satisfied at the commencement of the suit. The plaintiff could not, therefore, succeed upon the demise of Ann T. Sanders, if the mortgage deed was effectual to pass the title from her. Whether it was or not, depends upon the question how far it was affected by the provisions of the act relative to champerty and maintenance, approved January 7th, 1824. At the date of the mortgage, the appellants were in the adverse possession of the land, and therefore, according to the plain letter of the first section of the act, the mortgage passed no title so far as it embraced land in the adverse possession of the appellants. A mortgagee is, technically speaking, a purchaser. The act expressly forbids the purchase, "by deed of conveyance, bond or executory contract," of lands adversely possessed. If a mortgage was sustained as an exception, it would open a door to the easy evasion of the whole statute. We are of opinion, that the mortgage passed no title to the mortgagees for the land adversely held by the appellants.

Under the foregoing view of the subject, the plaintiff had a right to recover upon the demise of Ann T. Sanders, unless her title had been destroyed by the said act of January, 1824.

The first section, in substance, declares, that no person shall sell or purchase, by deed of conveyance or executory contract, any title to land adversely possessed by a person other than the vendor or vendee; that every deed or contract executed in violation of this section, shall be void, and that no right of action shall accrue thereon.

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A conveyance, by mortgage, passes the legal title to the mortgagee; but if there is a possession of the land held adversely to the parties to the mortgage, it is within the champerty act of Jan. 1824, and void; and therefore, does not destroy the mortgagor's right of action against the tenants in possession. [See Judge Nicholas' opinion upon this point, *post* p. 78.]

Conveyances of land in the adverse possession of any person, other than the vendor or vendee, are void merely — there is no forfeiture of the title for that cause.

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Contracts to carry on land suits for part, or profit, of the land, are prohibited—the penalty, a forfeiture of the title of either party to the contract, to enure to the benefit of the occupant; who may plead or shew the fact, in bar of any suit for the land, brought by any party to such contract.

The second section provides, that it shall not be lawful to contract, or to undertake to recover, or carry on any suit for the recovery of land adversely possessed, in consideration to have part or profit thereof; that the parties to such contract shall forfeit all right to the land claimed, and all right to maintain any action upon the title, and that the title shall vest in the commonwealth, and enure to the benefit of the adverse possessor.

The third section allows the adverse possessor “to shew or plead the sale or purchase of any pretended right or title in violation of the first section of this act, or any contract or agreement made in violation of the second section of this act, in bar of any action or suit, or claim founded thereon.”

The decision must turn upon the proper construction of the third section. Ann T. Sanders violated the first section, inasmuch as she sold by *deed of conveyance* land adversely possessed by the appellants. The consequence is, that the deed, under the first section, passed no title. It is *void*. Ann T. Sanders has not violated the second section. How, then, does the third section operate upon the case? Does it bar her present action? The great object of the legislature, by the act of 1824, was to prevent lands, adversely possessed, from being made the subject of contracts, except with the occupant. He might quiet his title; but strangers should not purchase over his head. Therefore, the first section made *bona fide* attempts to pass the title to such lands, *void*, unless in favor of the occupant; and the second section declared that a champertous contract should forfeit the title to the commonwealth, for the benefit of the occupant. The purchaser, under the first section, could neither maintain an action upon his deed, nor contract, against the vendor or occupant, because his deed and contract were, by the terms of the act, declared to be void. The vendor, violating the second section, could not, thereafter, maintain an action upon his forfeited title, (conceding, for the present, that the forfeiture could be enforced as contemplated by the act,) and the purchaser could not, because no title could vest in him under the deed. Under the first section, as the title was not for-

feited, the vendor might maintain an action asserting it, notwithstanding his attempt to part with it. Now, in order to defeat the plaintiff, the effect of the third section, connected with the first, must operate to the destruction of Ann T. Sanders' title, and make her situation as bad as it would have been under the operation of the second section, had she violated that instead of the first. We cannot indulge in such a construction of the act, because it is, in effect, annihilating a right, as a punishment, when no offence has been committed by the party. The act purports to forfeit the title in one case only, and that is for a champertous contract. If the title is destroyed because of the attempt to mortgage it, the legislature have accomplished its destruction, not by any clear declarations of intention to do it in such a case, but have done it by laying the foundation in the third section for an inference, that such was the design. Before such an inference can be indulged, the ground for it should be very manifest, because we see that when the legislature declared in the second section, that the land should be forfeited in a certain state of case, it was done in the most unequivocal manner; and there is every reason to suppose that the legislature would have been equally clear and explicit in declaring the forfeiture or destruction of the title for a violation of the first section, as they were in regard to the second, if the intention had been the same as to both.

The whole argument in favor of the destruction of Ann T. Sanders' right or title, rests upon the meaning of the words "*founded thereon*," as used in the third section. The legislature declare their will, to bar certain actions, suits and claims founded on certain things. What are they? The third section gives the answer, to wit, all actions, suits or claims founded on "the sale or purchase of any pretended right or title in violation of the first section, or on any contract or agreement made in violation of the second." This answer, given in the words of the law, is incorrect according to the argument on the other side, because, as it is contended, the word "*thereon*" refers to its immediate antecedent, and that antecedent is "*title or right*," and hence the answer

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should be, that all actions, suits and claims are barred, founded on the *title* or *right* which has been made the subject of contract in violation of the first and second sections. This cannot be the true construction; first, because it is inconsistent with the rules of grammar; and secondly, because it is not true that "right and title" are the immediate antecedents; and thirdly, because other expressions of the third section prove conclusively that the meaning is otherwise. Relative words, in the construction of sentences, are often used for the whole or part of a sentence, as its antecedent. The following example is given by Kirkham: "We are required to fear God and keep his commandments, *which* is the whole duty of man." The phrase, "to fear God and keep his commandments," is the antecedent to the relative *which*. The word *thereon*, in the third section, is used as a relative, and the construction of the whole sentence in which it occurs, proves that we can with no propriety select a particular word as its antecedent, but that it relates to the entire phrases which refer to the first and second sections of the act. When we ask what things are meant and referred to by the word "*thereon*," the answer is in the language of the phrases which constitute the antecedent, to wit, the sale or purchase of any pretended right in violation of the first section, or any contract or agreement made in violation of the second section. If the word *thereon* is limited to the *title*, and that was the design of the legislature, they should have used the words *founded on it*, instead of *founded thereon*. By the use of the pronoun *it*, we should have selected the particular noun substituted thereby. The expression *founded thereon* relates to "any contract or agreement made in violation of the second section," beyond all doubt. Such *contract* or *agreement* is the immediate antecedent, and if we are bound to select a particular word, instead of the whole of both or one member of the entire sentence as the antecedent, we should be bound to take the contracts and agreements here alluded to, under the rigid rule of hunting up the immediate antecedent. As these contracts and agreements must be embraced in the antecedent in part at least, why not em-

brace the sales and purchases, forbidden by the first section, likewise? Those sales and purchases were the great objects in the contemplation of the legislature, and the mention of the title was for no other purpose than to designate the character of the sale or purchase which the legislature had in view: to wit, the sale or purchase of a pretence title in violation of the first section.

The meaning of the third section is this—all actions or claims *growing out of* (would perhaps have been a better expression than *founded thereon*;) sales, purchases, contracts or agreements made in violation of the first and second sections of the act, shall be barred and set at nought, by shewing or pleading the illegality of the sales &c. out of which, or upon which, the right attempted to be asserted is supposed to grow or to be founded. That provision of the third section which makes the defence consist in shewing the illegality of the sales, contracts &c., in connection with the whole object of the statute, proves that the third section was added, through abundant caution, to give effect in practice to the two first sections, by pointing out the mode of defence; and the provision made in the third section for a discovery, is confirmation, that the only object of the third section was to point out the proper course to render the two first sections available to the adverse possessor of the soil.

We have deemed it proper to state thus much, because of the importance of a proper construction of the third section of the act of 1824, and because of the division of the court upon the point, in the case of *Wash vs. McBrayer*, 1 *Dana*, 569.

We are, therefore, of opinion, that the act of 1824 interposes no obstacle to the lessor's right in the present case; and as the other questions were correctly decided by the circuit court, the judgment is affirmed, with costs.

JUDGE NICHOLAS concurring in the foregoing decision, added the following explanatory remarks.

It was intimated in my dissent, in the case of *Wash vs. McBrayer*, that a *bona fide* mortgage was not a sale or purchase of land within the true intent and meaning of the third section of the act of 1824; but as, according

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Judge NICHOLAS' remarks, assenting to the decision.

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to the construction given by a majority of the court to that section, it does not preclude a recovery in the name of the mortgagor, there is no necessity for determining that question, or attempting to save a mortgage from the operation of that section. It is scarcely necessary to add, that though my opinion of the true construction of that section is unchanged, I now cheerfully acquiesce in the construction given to it, by a majority of the court, in *Wash vs. McBrayer*. It is for the legislature to determine, whether it will permit the evasions of the wholesome provisions of the first section, which that construction allows. It would subserve no good purpose to answer the new views now presented in support of that construction, or to adduce such additional arguments as have since suggested themselves in aid of those formerly urged by myself.

2d 74
123 358

EJECTMENT.

Muldrow's Heirs vs. Fox's Heirs and Devisees.

[Mr. Crittenden for Appellants : Mr. Haggin for Appellees.]

FROM THE CIRCUIT COURT FOR WOODFORD COUNTY.

April 14.

Chief Justice ROBERTSON delivered the Opinion of the Court.

Judgment in ejectment, in favor of Fox's heirs and devisees, for land that had been sold by his acting executors.

THE appellants seek the reversal of a judgment in ejectment, which the appellees obtained against them, for a tract of land, which Arthur Fox, the ancestor of the appellees, by his will, proved and admitted to record, in May, 1794, directed to be sold for the benefit of his children, and which was sold and conveyed, in 1817, to Andrew Muldrow, the ancestor of the appellants, by Henry Lee and Alexander D. Orr, the only acting executors of the will of Arthur Fox.

The devise in the will, under which the sale was made.

After making sundry specific devises, and after directing his executors to sell certain tracts of land for raising a fund for the education of his children, the testator, Arthur Fox, made this further devise :—"My

will and desire further is, that all my lands not particularly mentioned shall be sold for the best price that can be, and the money laid out to the best advantage for my children ;” and then added—“ also, my desire and will further is, that Henry Lee, Alexander D. Orr and Francis Taylor shall be my whole and sole executors, for carrying this will into full execution, agreeable to the real intent and meaning of the same.”

The land which is the subject of controversy in this suit, had not been specifically devised, and was, of course, embraced by the clause of the will, which has been quoted, directing a sale for the benefit of the children.

The executors, either doubting their power to sell, or deeming a sale before the year 1811 inexpedient, had made no sale of the land when, in May, 1811, the heirs and devisees of Arthur Fox filed a bill in chancery, praying for a decree directing a sale and an appropriation of the proceeds; and, in August, 1811, a decree was accordingly rendered, on bill and answer, directing the acting executors to make sale of the land now in controversy, and appropriate the proceeds to the extinguishment of a balance due the executor, Lee, for advances of his own funds, and the residue, if any, to be distributed among the devisees.

It appears from the deposition of Henry Lee, which was read on the trial in the circuit court, that the devisees, after obtaining the decree, agreed that they would sell the land; but that, having been unable, for several years, to make an advantageous sale, they requested the executors to negotiate a sale, and that, accordingly, shortly afterwards, in 1817, they, the executors, sold the land to Andrew Muldrow, for the price at which gentlemen of intelligence had valued it, and which was the highest price that could be obtained.

The youngest child of the testator became twenty one years old in March, 1813.

Upon the foregoing facts, in substance, the circuit court instructed the jury, that the deed from Lee and Orr to Andrew Muldrow, passed no title, and that the legal right still remained in the heirs of Arthur Fox, deceased.

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The sale having been long delayed, the heirs and devisees filed a bill for a sale, by the acting ex'ors, and appropriation of the proceeds—decree accordingly.

The heirs themselves undertook to sell the land; but not succeeding, for six years, requested the executors to do it—who sold it to Muldrow, at a fair price.

The youngest heir then of age.

Instruction, that the deed of the the ex'ors passed no title.

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Grounds upon
which the va-
lidity of the sale
is contested.

Land devised to
be sold, may be
sold by the act-
ing executors,
where no one
is appointed by
the will to make
the sale, or the
nominee refuses
to act, or dies
before the sale.
Statute of 197,
§44.

Reasons for con-
struing this will

That instruction presents the only question of any importance or difficulty.

If the acting executors had power to sell, and pursued that power substantially and in good faith, the instruction cannot be sustained. But the appellees insist, that no power to sell was ever conferred on Lee and Orr, either by the will or by the decree; and that, if competent authority to sell had ever been given, lapse of time destroyed it; or that, in any event, the purchaser was bound to see to the application of the sale money; that it had not been legally appropriated, and therefore the deed conferred no title.

The forty fourth section of an act of 1797, 1 *Digest*, 531, provides that, "*the sale and conveyance of land devised to be sold, shall be made by the executors, or such of them as shall undertake the execution of the will, if no other person be thereby appointed for that purpose, or if the person so appointed shall refuse to perform the trust, or die before he shall have completed it.*"

If the will in this case should be understood as making no appointment of any person or persons to sell the land devised to be sold and now in controversy, the foregoing statutory enactment conferred plenary and unquestionable power on the acting executors who did sell and convey it to the ancestor of the appellants. But the counsel for the appellees has argued, that this statute does not apply to this case, because, as he insists, the power was not peremptory, but was discretionary merely, and he relies on the case of *Wooldridge's Heirs vs. Walkins' Executors et als.*, 3 *Bibb*, 349, as an authority in point. The doctrine recognised and applied in that case, does not apply to this case, because here the sale of the land was not left to depend on the option or judgment of the executors, but was directed positively and unconditionally. But the argument of the counsel, in assimilating this case to that decided in third *Bibb*, assumes, by a necessary implication, that the will of Arthur Fox gave to *his executors* power to sell the land; and in this we are disposed to concur with the counsel, for the following reasons: first, the executors were expressly directed to sell land for the education of the

children ; and immediately afterwards, the testator directed that other land be *also* sold, and the proceeds laid out to the best advantage for the children ; wherefore, the inference is almost inevitable, that the testator intended that his executors should act in the latter case as well as in the former ; second, it is probable, and even almost certain, that the testator intended that the avails of the sale should be distributed or appropriated by his executors, and therefore the rational inference is, that he also intended that *they* should make the sale and conveyance. *Davone vs. Fanning*, 2 *Johnson's Chancery Reports*, 254. Third, in nominating his executors, the testator declared that they should have full power to carry into effect *all the provisions of his will* ; which should be deemed in effect a declaration that they should have power to sell the land now in controversy, and the sale of which was directed by the will.

If, then, the forty fourth section of the act of 1797 (*supra*,) does not apply to this case, its inapplicability must be the consequence only of giving such an interpretation to that provision as to restrict its application to cases in which either no person is empowered to sell, or the persons appointed to sell are not the executors.

It may be admitted that (in the absence of any opposing authority,) this might be a plausible construction ; first, because the letter of the enactment may not authorize a more comprehensive application ; second, because the literal interpretation might supply the defects in the preexisting law, which were within the presumed purpose of the legislature ; for it had been provided by the statute of 21 Hen. VIII. c. 4, that such of the executors as accepted the trust might execute the power when the will authorized the executors to sell. Should it be said, that this enactment was intended only for cases in which a *naked* power is given to executors *nominatim*, it might be answered, that a concession that such a restricted interpretation is the true one, would not materially affect the point we are considering ; because, according to the common law, as expounded by Coke, a power, (whether naked or united

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as conferring up
on the execu-
tors power to
make the sale.

The act of '97
comprehends ca-
ses, like this,
where ex'rs are
directed to sell,
and some of
them do not ac-
cept the trust ;
and authorizes
the sale by those
who act.

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with an interest, or an express consequential trust) when given to executors in *their collective and fiducial character as trustees*, would survive and might be executed, as we understand the authorities, by such of the executors as accepted the trust.

It seems, however, from an intimation in *Wooldridge vs. Watkins*, (*supra*), that the court was inclined, in that case, to consider the forty fourth section of the statute of 1797, as comprehending a case in which executors are directed to sell, but a part of them refused to accept the trust; and a similar opinion was given in *Coleman vs. McKinney*, 3 J. J. Marshall, 246. We are not disposed to overturn the construction thus judicially recognised. If this be the true exposition, *the statute applies to this case*. But even should that construction be not sustainable, we are of the opinion that, independently of the act of 1797, the acting executors, Lee and Orr, had legal power to sell and convey.

A power given to a plurality of persons cannot be exercised by a part of them; and this rule, the common law, before the 21 of H. VIII., applied to *ex'ors*, when, to them, by their proper names, a mere power was given, for then it was supposed to be given to them as individuals, and not as executors.—But—

It is undisputably the settled doctrine of the common law, that a naked power given to a plurality of persons (not executors) cannot survive or be executed by a less number than the whole of those whom the grantor has required to execute it; and no other doctrine would be just or consistent; for if A authorize B, C and D to act for him, and do not say that any one, or a majority, may execute the power, the act of A, or of A and B, would be unauthorized, and should, therefore be void.

The common law, as understood by Coke, *Co. Lit.* 112, b.—113, a.—181, b., and by Doddridge, *Shep. Touch.* 429, and by Powell, *Pow. on Dev.* 292—310, applied the same rule to a mere power given to executors by name. These authorities should be deemed satisfactory—although we find Hargrave *contra*, *Co. Lit.* 113, a. note; for they have not only been recognised by this court, but seem to be fortified by parliamentary concurrence, inferrible from the preamble to the statute of 21 Hen. VIII. reciting that a power given to executors by name, could not be legally executed by less than “*the whole number of the executors named to and for the same.*” However, the rule, as thus applied by the common law, and

until the 21st Hen. VIII., can be sustained only by considering a naked power to executors *nominatim*, as given to the *individuals named*, not *as* executors, or *because* they are executors, and by deeming the official adjunct, when it is used, as mere *descriptio personarum*: and this, the argument of Hargrave and a proper analysis will, we think, make sufficiently manifest.

It is equally well settled, that a naked power given to executors, not by their individual names, but by their aggregate fiducial name—as “*to my executors*”—will survive, *as long as a plural number shall remain*—*Co. Lit.* 112, b.; *Sugden on Powers*, 159; 4 *Kent's Com.* 326; and some of the same and other authorities shew that a power coupled with an interest, or with an express trust *consequential* to the primary power, when conferred on executors either *nominatim*, or *qua* executors, will survive. 3 *Atk.* 174; 2 *Pr. Wms.* 102; *Osgood vs. Franklin*, 2 *Johnson's Chy. Reps.* 20–21. It seems to be a logical and legal deduction that, in both classes of cases last described, such of the executors as shall have accepted the trust and survive, may execute the power lawfully and effectually; for if the statute of Hen. VIII. apply only to the execution of naked powers given to executors, the reason of the common law applies with equal efficacy to the execution of powers by the executors who accept, in cases in which a mere power is given to “*the executors as fiduciaries*, and in which, power (given in either mode) is coupled with an interest or an express consequential trust; and thus, too, we understand the authorities.—When a testator confers a special power on his executors, *as executors*, he should be understood to mean (nothing appearing to the contrary,) those who should undertake and should act as the executors of his will.

Now, in this case, the power to sell is not only given to the executors in their collective character and name as such, but it is connected with a consequential and express trust: to wit, the distribution of the proceeds of sale. Wherefore, whether the act of 1797 shall apply or not, the acting executors, Lee and Orr, *once* had power to sell and convey the tract of land which is the sub-

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Where the power is conferred upon executors, merely as such; or where it is coupled with an interest, or with an express trust consequent upon the primary power, (though given to the executors *nominatim*,) it is to be understood as conferred upon them in their fiduciary character, collectively; and it survives as long as more than one remains;—but not to a single one.

Refusal of an ex'or to undertake a trust, may be presumed from lapse of time and other facts.

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Where there is a *naked* power given to executors to sell land, it does not, at common law, survive to one:—*aliter*, when the power is coupled with an interest. Where it depends upon the discretion of the nominees, whether there shall be a sale or not, the statute of '97 does not apply. 3 *Bibb*, 349.

ject of this suit; for, if Taylor died, the power survived, and if he did not die, his refusal to undertake the execution of the trust, should be presumed from the lapse of time and other facts.

There is nothing judicially settled in the case in 3rd *Bibb* (*supra*,) inconsistent with any preliminary doctrine of this opinion, or with the foregoing conclusion. In that case, the court decided—first, that, (at common law,) a *naked* power given to executors, does not survive to *one* executor: second, that when the execution or nonexecution, of a naked power is confided to the judgment and election of the nominees, the forty fourth section of the act of 1797 does not apply, because, in the opinion of the court, that section embraces the case only in which a sale is *directed*, or, in other words, an estate is "*devised to be sold*" without reservation or contingency. If there is any thing in that opinion inconsistent with this, it must be found in some deduction from the possible applications of the doctrine settled on the first point. But how far any such inconsistent deductions might be warranted, cannot be ascertained from any thing appearing. It does not appear whether, in that case, the power was given to the executors *nominatim*, or *as executors, eo nomine*; nor does it appear, that the court considered or noticed the statute of 21 Hen. VIII. But, if that statute was considered, either the power in that case, was given to the executors *ratione officii*, and not by their individual names, and the court must have been of the opinion that the statute did not apply to such a power, but should be restricted to a naked power given to executors *by name*, or to cases of refusal by some to accept the trust, or the court deemed that statute inapplicable to a contingent power, and therefore decided that, as (in their opinion,) the statute of 21 Hen. VIII. did not apply, and as the power was given to the executors in their fiducial characters, unconnected with interest or consequential trust, it did not survive to *one executor*. If such be the proper interpretation of the statute, (and in some respects, if not altogether, it doubtless is,) and if the power was given to the executors *eo nomine*, then, as it was a naked power with-

out interest or incidental and collateral trust, it did not survive to *one* executor, according to any doctrine or authority recognised in this opinion. But if the court, in that case, had intended to lay down the broad and unqualified proposition, that a power given to executors would, *in no case*, survive, nor could, *under any circumstances*, be executed by those who accept, when any refuse, we could not regard that opinion, in either particular, as authoritative. The opinion, however, does not allude to the power of executors who act when co-nominees refuse to accept; and not only does it not intimate that power to executors will, in no case, survive, but it contains a clear implication that power connected with interest will survive; and doubtless other qualifications would have been recognised had any such precision or discrimination been deemed necessary, in a judicial opinion on the facts presented in that case.

We are to be understood as not intending to decide whether Lee and Orr could have executed the power to sell, had the sale, instead of being directed peremptorily, been left to the judgment or option of the executors. An opinion on that point would now be extra-judicial; and therefore, we forbear to make any intimation one way or the other. The counsel for the appellees has, however, insisted that the direction to "*lay out*" the proceeds of sale "to the best advantage for the children," implies that the mode of appropriation was confided to the judgment of the executors; and hence he has argued that the power to sell should receive a similar interpretation: *sed non sequitur*. The power to sell is one thing; the appropriation of the proceeds of the sale is another thing; and even when, as in this case, the same persons are the depositories of both powers, the fact that the distribution is optional, would not shew that the sale is also discretionary. In this case there was no option as to the sale—the power is unconditional—the direction to sell peremptory. Nor is it admitted, that the executors had any power left to them to judge whether the proceeds of sale should be distributed, or among whom, or in what proportions. The will

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If there is a positive direction in a will that land shall be sold, its being coupled with a direction that the executors shall "lay out the proceeds to the best advantage for the children," does not change it, or render the sale discretionary with the executors: though part of them who accept the trust may make the sale, while the concurrence of all might be required to distribute the proceeds.

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directed, that the money should go to the children, and in equal portions of course. The only discretion which was confided was as to the mode and time of distribution; and it may well be doubted whether such a discretion differed essentially from that necessarily confided as to the time and mode of the sale itself. Nor does the character or the execution of the power depend on the nature of the power to distribute, or the right to execute it. Two executors might be competent for the execution of the former, even though *they* might be incompetent for the execution of the latter. And, had such a course been necessary, the chancellor might, after the sale by the two acting executors, have supplied any accidental deficit in *their* legal power to make distribution; and *this*, if it was necessary, *was done*.

The style & tenor of the whole will should be attended to, in deciding upon the power of the executors under a particular clause.

In addition to the foregoing considerations, the *style* and *tenor* of the whole will should not pass unnoticed. *They* tend to shew that it was *the intention of the testator that those who should act as his executors should have power to do every thing enjoined or directed by the will; that is, that the executors who should undertake the execution of his will, should execute the whole will*. This, of itself, should be satisfactory and conclusive.

But, should there still be doubt as to the power of the two acting executors to sell and convey the land, the decree, to which reference has already been made, should remove all difficulty, so far as the power of two alone, instead of all three of the nominees, is liable to be questioned.

The chancellor cannot enforce the execution of a mere power. But if the power is connected with a trust, or if it be the duty of the depository to execute it, the chancellor may enforce its execution; or he may supply a defective execution. — A decree made, in such a case, with all necessary parties before the court, can be impeached only by a regular proceeding—not incidentally, in a trial at law—there it must have its due influence.

Although a chancellor cannot enforce the execution of a mere power, 2 Pr. Wms. 227, nevertheless, there can be no doubt that he may, on the application of a *beneficial party*, enforce the execution, or supply the defective execution, of a power connected with a trust, or which it is the duty of the depository to execute. 4 Kent's Commentaries, 344; 2 Roper on Legacies, 300. Whenever the power fails in consequence of the death or accidental incapacity of its appointed depository, or whenever it is in danger of being frustrated or injuriously

exercised, the chancellor may interpose, and in a proper case, between the proper parties, his decree will be effectual. Such appears to have been the object of the bill, and such the effect of the decree we are now considering. All proper parties were before the court; the proceedings and decree appear, *prima facie*, to have been fair and regular; and therefore, even if there should be any ground for impeaching the decree in a direct proceeding for that purpose in equity, a court of common law should not incidentally disregard it, or question its effect, so far as, being deemed valid, it is entitled to any influence; and we have already suggested that, to the full extent of the objection that two only of the nominated executors could not sell and convey, the decree should be conclusive.

II. The time which had elapsed from the death of the testator to the filing of the bill for enforcing the sale, (seventeen years,) cannot, *per se*, have operated as an extinguishment of the power to sell; nor could it have operated as an inflexible bar to the execution of the power. It might have enabled the devisees to resist and prevent the execution of the power, and to have taken possession of the land and disposed of it, as they might have deemed proper, had they been opposed to the sale under the will, and had they, instead of soliciting a sale, deemed it their interest to oppose it. *Osgood vs. Franklin* (*supra*.) is a very strong case (*stronger than this*.) as to the lapse of time.

Nor can the lapse of time from the decree to the sale, (about six years,) without any other circumstance, imparting to it a peculiar efficacy, invalidate the conveyance. The decree prescribed no limitation to the time of selling; and were any explanation of the delay necessary, Lee's deposition furnishes all that reason could require.

But, as the intention of the testator must govern the construction and execution of the power, the lapse of time would, even yet, have great and conclusive effect if a right interpretation of the will should shew, that the testator intended that the sale should have been made at an earlier period than 1811—when the bill was

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Executors being directed to sell land of the testator—the will being silent as to the time within which the sale is to be made, the power is not lost by mere lapse of time, (17 years in this case.)—But the heirs or devisees may object and prevent the sale, after an unreasonable delay.

If a decree is made requiring ex'ors to sell land, as directed by the will, the omission to comply for a long time, (six years,) does not invalidate the power. But the testator's intentions must be observed, and if he has limited a time, and that has passed, the power is gone—the chancellor cannot revive it.

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filed, and that he intended that the power should expire before that time. For, if it can be shewn that the power had expired, (as the chancellor's decree could not have resuscitated it,) the sale was without the testator's authority, and could derive no aid from the will.

But we are unable to ascertain from the will, that the power had expired by limitation. The will prescribed no definite or express limitation, and a constructive limitation would be hazardous, and altogether rash and arbitrary. The counsel for the appellees has argued, that it was evidently the testator's intention that the land should be sold during the minority of his children. Perhaps that may have been his intention; but, if it were, it cannot be deduced from any thing in the will with a precision truly judicial, or a certainty in any degree satisfactory.

If a testator devised land to be sold, to educate his children, it may be thence inferred, that he intended the sale should be made during their minority.

We might infer that the testator intended the sale, during the minority of his children, and all his children, of the lands which he devised for *their education*; because the object of the sale could not have been reasonably effectuated at a more remote period. But the land, which Andrew Muldrow bought, was destined by the testator, to a different purpose, and one altogether general and indefinite. It would be but reasonable to presume that the testator, having made a specific appropriation of as much of his estate as was necessary for the maintenance and education of his children, and of as much as was conveniently distributable, concluded that the comparatively unimportant residue of his land should be sold for the purpose of distribution equally among his children. But *when* it was to be sold, was left to the discretion of his executors. The only restriction as to time, is that implied in every general grant of a similar power, to wit, that the sale should be in *convenient time*.

The proceeds were to have been *laid out* for the benefit of his children—but when or how? While they were *all minors*? This court cannot so decide. Before they *all* attained *majority*? We cannot say so. If by appropriating this land to the payment of debts, other estate, deemed more valuable, could have been sav-

ed, and the executors had considered such a disposition most advantageous to the children, they might rightfully have applied the land to that purpose. If the executors, believing that an immediate sale would have been disadvantageous, had applied their own funds to the payment of debts, and had done nothing more until all the children had become twenty one years old, and then, believing that an advantageous sale could be made, had sold for a price greatly exceeding the principal and legal interest which an earlier sale could have produced—would this court have been bound to decide—could it have decided—that the power had expired, and that the sale therefore was void? Such would have been this case (as we may infer) *had there been no decree at the instance of the devisees themselves.*

The trust, in this case, like other general trusts, was altogether unlimited in duration, except so far as all such trusts are circumscribed *within the bounds of reason and convenience*; and, therefore, it was never extinct as long as all the parties concerned, to wit, the executors and devisees, chose to keep it alive. But, as before suggested, if there had been unreasonable negligence or delinquency, and the devisees had therefore deemed it their interest to prevent the sale of the land, they might have done so. That was their appropriate and only mode of separating the *power* from the *land*, and of holding the latter instead of its vendible value.

It is not, therefore, necessary to decide whether, if the power had been extinct before the bill in chancery was filed, or the decree rendered, the appellees would be estopped by that decree. Nor does it become necessary to determine what effect, if any, the settlement in the county court shall have.

III. As no specific appropriation of the proceeds of the sale was directed by the will, the purchaser of the land was not bound to see to their application. But, had it been otherwise, the legal effect of the conveyance would not have been changed or impaired in a

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of the purchase money. And even where there is such an appropriation, and the purchaser fails to attend to it, the conveyance is, nevertheless, valid at law: the remedy is in chancery.

No specific appropriation of the proceeds of land devised to be sold, being made, the purchaser is not bound to see to the application

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court of law. The redress would have been in equity. And, moreover, the record, as it now appears, would not allow this court to decide, that the money for which the land was sold, was not legally and honestly applied according to the decree, and consistently with the objects and wishes of the testator.

Wherefore, it is considered by this court, that the judgment of the circuit court be reversed, and the cause remanded for a new trial.

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EJECTMENT.

Neal et al. vs. Robertson et al.

[Mr. Haggin for Plaintiffs : Mr. Crittenden for Defendants.]

FROM THE CIRCUIT COURT FOR FRANKLIN COUNTY.

April 14.

Judge NICHOLAS delivered the Opinion of the Court—the Chief Justice taking no part in the decision.

Two former opinions in this case referred to.

THIS is the same case twice formerly before this court, as it will be found reported, 5 *Monroe*, 212, and 5 *J. J. Marshall*, 211:

Judgment for defendants.

On the return of the cause to the circuit court, the defendants again obtained a verdict and judgment.

New evidence upon the last trial, in the ct. below.

In addition to the testimony given on the former trial, as detailed in 5 *J. J. Marshall*, the defendants gave in evidence the deed from James S. Lemaster to Phillips, and further connected themselves with the Sturgus claim, by a bond from Phillips to one Bulger, of March, 1789, for the land in contest, and an assignment of that bond, by Bulger, to the Tilfords: which supplied the defects in the proof pointed out in the opinion delivered and reported, 5 *J. J. Marshall*. They also gave in evidence a deed for the land, from Neal and wife, to Micajah and Elisha Cole, two of the lessors of the plaintiff, dated in June, 1817. It was admitted, "that Mrs. Neal, the patentee, was a native, and is yet a citizen of

Virginia ; that she married Neal in 1794 or 1795, being at the time, only fifteen years of age." The acknowledgment of the deed from Neal and wife was taken before a clerk in this state, but his certificate is, perhaps, not sufficient to pass more than a dower interest, and not her entire estate.

On the case thus made out, the plaintiffs moved the court to instruct the jury, that they were not barred by the statutes of limitation. The court refused to give this instruction, and instructed the jury, that, if they believed the evidence, the plaintiffs were barred by the limitation act of 1809.

These instructions were refused, and given, on the ground that the deed to the Coles passed the estate to them during the life of Neal the husband ; and that they had no right to avail themselves of the disability of Mrs. Neal. As the suit was commenced in 1822, the seven years had not run since the conveyance to the Coles ; but it had run against Neal, the husband, prior even to the date of that deed, provided both he and his wife were barred, or provided the statute would bar him alone, without also barring his wife.

It cannot properly be contended that Mrs. Neal was barred ; for though the patent issued to her during her coverture, and the land therefore cannot be said to have descended or been devised to her during coverture, and her right is not, therefore, such a one as would be saved to her for three years after her discoveriture, by the second section of the act of 1814, yet according to the construction we give that section, it does not apply at all to the seven years limitation of 1809 ; so that it is immaterial, at present, to determine whether it does or does not take away all saving in favor of *femes covertis* under the general limitation law of 1796, except where the land shall have descended or been devised to them during their coverture.

Whether the husband may be so barred, that the land cannot be recovered in his life time, and can only be recovered after his death, when the right returns to the wife, is a question which was waived when the case was formerly here. The court spoke of it as "a question of

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Instructions in that court, and question now to be decided.

The savings in the second section of the limitation law of 1814, have no application to the seven years law of 1809.

Question reserved:—See the following paragraphs.

Actions, upon the title of *husband & wife*, to lands granted to her during coverture, are barred by the 7 years law.

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some nicety, in the construction "of our statutes of limitation, and which had not, as far as known, undergone an express decision." It is presumed the court had forgotten the case of *Gore vs. Marshall*, 3 *Litt.* 469, where it was expressly decided, that a recovery by husband and wife, was not barred by seven years possession adverse to him, under the act of 1809. The same principle, under the act of 1796, appears also to have been recognised in *McIntire vs. Funk*, 5 *Litt.* 36, as to the right of entry; and in *Crozier vs. Gano*, 1 *Bibb*, 257; and 4 *Bibb*, 174, as to the action of detinue. The point, however, was disposed of in all those cases, without any discussion upon it, and without any appearance of attention having been directly called to it, as a debatable question, and, except in *Gore vs. Marshall*, an express adjudication upon it was not, perhaps, indispensably required. It may, therefore, be inferred, from what was said in 5 *Monroe*, that if those cases had been recollected, they would not have been considered as precluding or settling the question, and we are left at liberty to dispose of it, without the influence of any decided opinion on the part of our predecessors, the one way or the other. The apparent confliction between their opinions, has induced us to bestow some pains, in the pursuit of express authority upon the point; but we have not been able to find any case where it has been expressly mooted, either in this country or in England, and the English law writers are silent on the subject.

The saving in the act of 1809, is not materially different in its phraseology from that used in the statute of James, or in our statutes of 1796 and 1814. It is in these words: the limitation prescribed in this act, shall not extend to *femes covert* &c.; "but such persons shall be at liberty to institute such suits at any time, within seven years, after their disabilities are removed."

There is nothing in this language, which does, of itself, constitute a saving in favor of the husband, so as to prevent his being barred. If there be such saving, it must result from the general principles of law, in order the better to secure and preserve the right of the wife. We are not aware of any principle that will so operate.

It may be that the interest of the wife would, in some cases, be promoted by a recovery in the life time of her husband; thereby precluding the hazard of the loss of her right, by the loss of the evidence of it. But that is a description of interest not expressly protected by the words of the act, and the hazard referred to, may be sufficiently guarded against by a bill perpetuating the testimony. The saving was not intended to guard his interests against the effects of his own laches, but to save hers, so far as they were separate and disconnected from his. We do not perceive wherein their interests are so intimately blended, as indispensably, or even necessarily, to require an enforcement of her right in his life time. Their interests are so far divisible, that he can maintain a suit in his own name alone, for the land, and can, by his separate deed, alienate it during their joint lives. So where a recovery is had in a suit brought by both, it is still for his sole benefit during his life. As, then, the recovery is for his sole benefit, and as his separate alienation bars a recovery on a demise in the names of both, no good reason is perceived, why he should be permitted to avail himself of the saving in favor of the wife, to protect him against the effects of laches in this, more than in any other description of case.

A descent cast does not bar the right of entry of a *feme covert*, where the disseizin takes place during coverture, or during her infancy, if she marries before her full age. Yet, it is well settled, that it does bar the right of entry of the husband, and takes away their joint right of action; but after his death, the wife, or her heirs, may enter notwithstanding his laches. *Co. Lit.* 246, a. This saving of the right of entry of a *feme covert*, against the effect of a descent cast, is so identical as to the quality of the right, and is based so exclusively upon the same principle as the saving in her favor in the statutes of limitation, that the harmony of the law, as a uniform system or science, seems necessarily to require, that her rights, and those of her husband, should be placed upon the precise same footing in both cases.—Every reason we can surmise, which would bar the husband's right of entry, whilst it remained still unex-

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A descent cast does not bar the right of entry of a *feme covert*, where the disseizin was during coverture, or in her infancy, if she marries within age. Yet it does bar the right of the husband, or husband and wife, during his life—after which, it survives and reverts to her.

Question, upon the effect, after discovery, of the statute, on the rights of the *feme*, under a grant to her during coverture: not decided.

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tinct in the wife, in the one case, equally requires that it should be barred in the other also. In other words, if there is no sufficient reason for saving the right of the husband for the sake of the wife, in the one case, neither can there be any such in the other. The same rule or principle must regulate and control both.

Entertaining the opinion, that the right of Neal, the husband, would have been barred, provided it had still remained to him, it is unnecessary to notice the distinction upon which the circuit court appears to have acted, growing out of the alienation made by him to the Coles.

The judgment must be affirmed, with costs.

COVENANT.

Bullen et al. vs. McGillicuddy.

[Mr. Crittenden for Plaintiffs : Mr. Pittle for Defendant.]

FROM THE CIRCUIT COURT FOR JEFFERSON COUNTY.

April 15. Judge UNDERWOOD delivered the Opinion of the Court—Judge Nicholas taking no part in the decision of this case.

Written obligations may refer to other papers for names, sums &c. — The endorsement of a "promise to pay the amount of the within note," is a valid obligation, although it does not name the person to whom payment is to be made. The payee, as well as the amount of the note, and of the endorsement, must be the same, and the reference makes all sufficiently certain.

BULLEN and others, on the 22nd May, 1830, executed a note to McGillicuddy, promising to pay him, four months after date, seventeen hundred dollars, for value received, &c.

On the note there is a credit endorsed for two hundred and sixteen dollars five cents.

There is upon the back of the note, an instrument in these words:—

"Louisville, Oct. 3rd, 1830.

"On demand, we promise to pay the amount of the within note, in goods, deducting the above sum of two hundred and sixteen dollars five cents.

(Signed)

TILLAY, SCOTT & Co."

Bullen &c., in their tenth plea, relied on an accord, and the acceptance of the aforesaid instrument by the plaintiff, McGillicuddy, in full satisfaction of the note

sued on. Issue was taken on this plea. Upon the trial, the court instructed the jury, that the instrument signed by Tillay, Scott & Co., "was no evidence in support of the plea which set up a note alleged to have been executed to the plaintiff, McGillicuddy, by them, because there was no obligee in the obligation at all, and that, therefore, and on that account alone, they ought to find for the plaintiff."

This instruction was erroneous. It is true, that there is not inserted the name of an obligee or payee in the body of the instrument; but we think, that it is as clearly ascertainable from the endorsement, signed by Tillay, Scott & Co., connected with the note to which it refers, who the payee is, as if the name had been inserted. In construing the endorsement, it must be connected with the note, because it expressly refers to the "*within note.*" The amount which Tillay, Scott & Co. promised to pay, must be ascertained by looking into the note. If obligors may fix the amount of their liability by reference to other papers, as most indubitably they may, why may they not designate the payee in the same manner? If the promise had been to pay the amount of the within note to the *within mentioned payee*, although the name was not mentioned, the reference would have made the undertaking as certain, in respect to parties and amount, as if the sum had been expressed in dollars and cents, and the names all given. It is equally certain as it now stands. On demand, Tillay, Scott & Co. promise to pay the *within note*. Who has the right to demand the payment of the note? No one but McGillicuddy. Who has a right to receive payment? He alone has it, and if Tillay, Scott & Co. should pay to any one but him, it would be no discharge of the note. Who permitted them to sign the endorsement, dated the 3rd of October, upon the back of the note, dated the 22nd May? Nobody but McGillicuddy, for the note must be considered as in his possession, and subject to his control. The endorsement is utterly void, or it is a contract with him to pay the amount of the note. All the foregoing considerations shew, that McGillicuddy is designated with sufficient certainty as the payee, and it would be

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The giving and receiving of one obligation, in lieu of another, the parties to which, or some of them, are different, may be pleaded as an accord and satisfaction.—The transaction must better the condition of one, or both parties; if it leaves them as they were, it is of no avail as an accord and satisfaction.

Whether one obligation was given in satisfaction, or as a guarantee, of another,—being a question of intention,—is to be decided by a jury.

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very hard to deprive him of the right to enforce the payment, by Tillay, Scott & Co., were he to desire it.

As Tillay, Scott & Co. were, in part at least, different persons from the payors of the notes dated in May, their written engagement to pay, dated in October, may be the legitimate foundation of a plea of accord and satisfaction. The subject matter of an accord and satisfaction, to be good, must show some advantage or disadvantage—some prospect of loss or gain, to one or both of the parties, and unless the plea presents such a case it is not good. Tested by this rule, the tenth plea is good. The obligation, or note of new parties, if accepted in satisfaction, will discharge a note executed by other persons. The advantage of having other men bound for a debt, beside those who originally contracted it, is too obvious to need remark. Whether the note of Tillay, Scott & Co. was received as an additional security for the debt, or in full satisfaction of it, is a question for the jury, upon the evidence.

Judgment reversed, with costs, and cause remanded for a new trial.

TRAVERSE.

Lewis et al. vs. Outten.

[Mr. Haggin and Mr. Owsley for Plaintiffs: no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR MADISON COUNTY.

April 17: Chief Justice ROBERTSON delivered the Opinion of the Court.

The service of a warrant of forcible entry and detainer must be by notice to each defendant in person—constructive notice—as by copy left

This writ of error is prosecuted to reverse a judgment of restitution, rendered in the circuit court of Madison, on a traverse of an inquisition, against the defendant in error, who was plaintiff in a warrant of forcible entry and detainer.

There was no personal service of the warrant on

Courtney R. Lewis, one of the plaintiffs in error. There is nothing in the record tending to shew that he appeared on the trial in the country, or ever entered his appearance in the circuit court. The only evidence of a service on him of the warrant, is a return, in substance, that a written notice had been left at a house called "*the ferry house*"—that "*being supposed the most common place for him to be found.*" Such a return could not operate even as a good constructive notice. But the statute requires actual notice; the third section, 1 Dig. 609, requires that, "*notice shall be given to each defendant in person.*"

As there does not appear to have been any waiver of notice, the judgment was unauthorized, and must be reversed.

Another point is incidentally presented, which, as it may be important in practice, we will avail ourselves of this occasion to settle; that is, whether, after a change of venue, either party should have a right, without the consent of the other party, to a trial at the first term after the removal of the record, unless the papers shall have been deposited in the clerk's office of the court to which the venue shall have been changed, a sufficient length of time to afford a reasonable opportunity for preparation; and if not, then what shall be deemed such reasonable time.

We are satisfied, that reasonable time for preparation, after the translation of the papers, should be allowed. The statute has not expressly prescribed any precise time for such purpose. But, considering the objects and provisions of the statutes respecting changes of venue in civil cases, and looking to the only striking analogy, we are of the opinion, that ten days should be deemed the period which may be presumed to have been contemplated by the legislature. Unless, therefore, the papers shall have been deposited in the clerk's office of the court where the case is to be tried, at least ten days prior to the first day of the term next succeeding the removal of them, a trial at that term cannot be demanded as a matter of right.

Spring Term
1834.

Lewis et al.
vs.
Oulten.

&c. is insufficient.

Written notice left at the 'supposed most common place for him (def't) to be found,' is not a good constructive service.

Upon a change of venue, there must be a reasonable time allowed for preparation after the removal, before either party can be forced into trial—unless the clerk of the court to which the cause is removed, received the papers at least ten days before the first of the next term, neither party can, at that term, demand a trial.

Spring Term
1834.

Frost
vs.

Reynolds.

The papers were, in this case, deposited in the clerk's office of the Madison circuit court ten days before the first term succeeding the order changing the venue.— But, for the error which has been noticed, the judgment is reversed, and the cause remanded.

Scire Facias.

Frost vs. Reynolds.

[Mr. Buckner for Plaintiff: no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR WAYNE COUNTY.

April 17.

Judge UNDERWOOD delivered the Opinion of the Court.

Requisites of a *scire facias* against bail, under the act of 1829.

A *scire facias* which does not contain the necessary recitals and allegations to shew the legal right of the pltf. to have judgment against the defendant, is insufficient, and will be quashed on demurrer.

THE demurrer to the *scire facias* should have been sustained.

The *scire facias* has been drawn so unskillfully, that we are constrained to pronounce it destitute of substance as well as form.

A *scire facias* against bail should set out the pendency of the action ; the issuing of the process ; the order requiring bail ; the nature of the undertaking of the bail, in the words of the recognisance or the substance of them ; that the recognisance or bail piece was entered into before the sheriff or other proper officer, while the writ or process was in full force, and in his hands ; the rendition of the judgment, the issuing of execution thereon, directed to the proper county, and the return by the proper officer, "of no property found." These things being done with certainty, according to the record, the foundation is exhibited upon which the liability of the bail rests. The *scire facias* should then proceed to suggest or charge, that the defendant in the action against whom the judgment was rendered, had removed his effects out of the commonwealth after the undertaking of the bail, and conclude by commanding the sheriff to summon the bail, to appear, to *make known* or to *shew cause*, if any he can, why judgment of execution shall not be awarded against him. The foregoing

is required to make out a clear right to recover against the bail, under the act of the 29th of January, 1829. The *scire facias* must present such a right, and is defective if it does not.

Judgment reversed, with costs, and cause remanded, with directions to enter judgment on the demurrer, in favor of Frost.

Spring Term
1834.

Vance &c.
vs.
Ward.

Vance and Dicks vs. Ward.

ASSUMPSIT.

[Mr. Monroe for Appellants : Messrs. Morehead and Brown for Appellee.]

FROM THE CIRCUIT COURT FOR CHRISTIAN COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

April 17.

THIS was an action, brought by the appellants, to recover the amount of a bill of exchange drawn by Waggener, in their favor, on the appellee, Ward, and by him accepted.

The declaration contains several special counts and the usual money count. An issue was tried on the latter, and the jury, under the instruction of the court, found for Ward. To the pleas filed by him to the other counts, the appellants replied; their replications were demurred to, and the demurrers sustained.

The special counts, in addition to the acceptance made by Ward on the face of the bill, charge that Waggener drew the bill by virtue of a written authority from Ward, which was exhibited to one of the firm of Vance and Dicks, before he bought the bill, and that it was bought on the faith of that authority. The pleas, without denying this allegation, state

A writing, exhibited to the payee of a bill, by which the drawee authorizes it to be drawn, and upon the faith of which it is purchased, is equivalent to an acceptance, and binds the drawee to accept and pay the bill.

Where the drawee of a bill is thus bound to pay it, if the payee, to get an acceptance on the face of the bill, promises the drawee, that if the drawer does not take it up at maturity,

he, the payee, will,—such promise is without consideration, not binding, and no defence to an action on the acceptance.

Spring Term
1884.

Vance &c.
vs.
Ward.

that Ward made his acceptance on the face of the bill, for the accommodation of Vance and Dicks, and under an assurance that if Waggener did not take it up at maturity, they would.

It is well settled, that such authority as is charged in the declaration to have been given for drawing the bill, if shewn to the person who buys it upon the credit of such authority, is equivalent to, and may be treated as, an actual acceptance on the part of him who gave the authority. *Coolidge vs. Payson*, 2 *Wheaton*, 66. *Goodrich vs. Gordon*, 15 *Johnson*, 6. There was, therefore, no need for the acceptance made by Ward on the face of the bill, as he was equally bound without it; and the promise made by Vance and Dicks, to induce him to make that acceptance, was without consideration, and, consequently, not obligatory upon them. The pleas were, therefore, bad, and it is useless to enquire into the sufficiency of the excuse alleged in their replications for making that promise; that is, that it was made by one of them in ignorance of the authority upon which it was drawn, and of the circumstances under which it had been bought by the other partner.

The demurrers should have been overruled, and the pleas adjudged insufficient.

The court also erred, on the trial of the issue, in rejecting the deposition of Kingsley. We have not been able to discover any plausible ground for its rejection, and none has been suggested in argument.

Judgment reversed, with costs, and cause remanded, with directions to set aside the verdict, and for further proceedings consistent with this opinion.

Spring Term
1884.

Williams et al. vs. Hall.

MOTION.

[Messrs. Sanders and Depew for Plaintiffs : Mr. Monroe and Mr. McCann for Defendant.]

FROM THE CIRCUIT COURT FOR GRANT COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

April 18.

THIS writ of error is prosecuted to reverse a judgment, on motion, against a constable and his sureties, for his failure to return, within twenty days after the return day, a *fieri facias* which had been delivered to him.

There are many irregularities in the proceedings ; but we shall notice only two objections to the judgment.

First. The execution having been issued on a bond described as a *replevin bond*, but which did not purport to have been acknowledged before any constable, the plaintiffs in error offered to prove, by one of the obligors in the bond, that it was not taken by an officer, but was, in fact, acknowledged before a private individual. The circuit court refused to admit the offered testimony.

If there was no judgment authorizing the execution, the constable was not bound to levy, or to return it, and could not be held liable for any penalty for failing to do either, or both. If the bond was not taken as a statutory obligation, it could not be deemed a judgment, but could have the effect only of a common law obligation. Waiving the question whether, as it does not appear on its face to have been officially taken, it should therefore be deemed not to have the effect of a judgment, we are clearly of the opinion, that the testimony which was offered was competent. It would not contradict the bond, and the witness had no interest in the event of this suit ; no testimony which he could give in this case, could impair his liability as an obligor in the bond.

The measure of responsibility of an officer for failing to return, in due time, an execution for commonwealth's notes, is the value of the notes at the return day, with interest and damages. And there must be proof of the value of the notes, or the judgment will be erroneous.

A *replevin bond*—to have the force of a judgment, must be acknowledged before an officer—otherwise it is but a common law bond, on which no execution can legally issue.

A constable is not liable for any failure to act upon an execution issued upon a mere common law bond, not having the force of a judgment.

Where a *replevin* in bond does not purport to have been acknowledged before an officer, evidence is admissible to show that a private person took the acknowledgment.

—An obligor is a competent witness to prove that fact, in a trial between the obligee, and an officer charged with a failure to return an execution founded on the bond.

Spring Term
1834.

Edwards

vs.

Bohannon.

Second. The execution was for notes of the bank of the commonwealth. The judgment against the plaintiffs in error, is for specie; and there was no proof of the value of notes of the bank of the commonwealth.— In this respect, also, the judgment is erroneous. The value of the paper when the execution should have been returned, together with interest and damages, is the legal measure of responsibility, if any liability at all be established.

Wherefore, the judgment is reversed, and the cause remanded.

CHANCERY.

Edwards against Bohannon.

[Mr. Crittenden for Appellant : Mr. Haggin for Appellee.]

FROM THE CIRCUIT COURT FOR WOODFORD COUNTY.

April 18.

Chief Justice ROBERTSON delivered the Opinion of the Court.

To a bill to subject an equitable interest in land to the payment of a debt, under the act of 1828, or the lien of the vendor, the holder of the legal title is a necessary party.

A return of no property is indispensable, as the foundation of a suit to subject an equitable interest to the payment of a debt, under the act of 1828.

Where the bill shows that the complaint holds the equitable lien of a vendor

BOHANNON,—holding four judgments against Edwards, on notes given to himself, for a tract of land which he had covenanted to convey, and on other notes given to George T. Cotton, in consideration of a covenant by him to Edwards, for a title to another tract of land, and which latter notes had been assigned to Bohannon—filed a bill in chancery, for subjecting the equity of Edwards to the satisfaction of the judgments, and obtained a decree for the sale of the equity in each tract: which decree Edwards now seeks to reverse.

The bill alleges, that the title to one of the tracts is in Bohannon, and that the title to the other was in George T. Cotton, and descended, as we infer, to his heirs.— There is nothing in the answer of Edwards which, when properly understood, should be deemed inconsistent with that allegation in the bill. The vague and incidental suggestion, in the answer, as to Bohannon's title to both tracts, should be understood as intended

to mean only that, as Cotton's covenant for a title had been pledged to Bohannon, therefore, in that respect, the right was in *him*, (Bohannon.)

A proper and consistent interpretation of the bill and answer will allow no other deduction, than that the legal title to one of the tracts is in Cotton's heirs. Those heirs were not made parties. They were necessary parties—whether the object of the bill was to proceed altogether under the thirty seventh section of the act of 1828, or merely to enforce an equitable lien. In either aspect, a sale should not be decreed, unless the chancellor, by having the holder of the legal title before him, can be able to confer on the purchaser a perfect right.

If the object of the bill should be deemed to be, as its style and tenor tend to indicate, the subjection of the equitable right under the statute of 1828, Bohannon has shewn no title to a decree; because he has neither proved, nor alleged, that there had been any return of *nulla bona*, or that any writ of *feri facias* had ever been issued on any one of his judgments. And were this the only aspect in which the case could be viewed, it would be proper, in our mandate to the court below, to direct a dismissal of the bill.

But, though the bill contains no express assertion of any equitable lien, nor any direct prayer for the enforcement of such a lien, nevertheless, as the existence of such a lien may be inferred from the facts exhibited, a decree for enforcing it might be proper under the general prayer for relief. The assignment, by Cotton, of the notes given to him, transferred his equitable lien to the assignee; and there is nothing in the record tending to shew that an equitable lien did not result to Cotton and Bohannon, or that it has ever been extinguished or impaired.

We are disposed, therefore, to allow time for the proper parties to be made.

Wherefore, as there was an apparent defect of essential parties, the decree of the circuit court must be reversed, and the cause remanded for further proceedings.

Spring Term
1834.

Edwards

vs.

Bohannon.

of land, for the purchase money, there may be a decree to enforce it, under the general prayer for relief, tho' such decree is not expressly prayed; — and time may be allowed to bring in the necessary parties.

If the vendor of land holds a note, with an equitable lien for the purchase money, his assignment of the note carries the equitable lien with it.

Spring Term
1834.

TRAVERSE.

Elms vs. Randall.

[Mr. Crittenden for Appellant: Mr. Charles A. Wickliffe for Appellee.]

FROM THE CIRCUIT COURT FOR JEFFERSON COUNTY.

April 13. Judge UNDERWOOD delivered the Opinion of the Court.

Neither tenant nor sub-tenant can legally attorn to any claimant of the land but the lessor under whom he entered. But—After the expiration of the term, the landlord may have a warrant of forcible detainer against any one in possession; or he may make a peaceable entry, and having done so, may lease the land to the subtenant; who will thereby be excused from restoring the possession to his first lessor; unless he was bound to do so by express covenant—for breach of which an action is the only remedy.

Upon a traverse of the finding upon a warrant of forcible detainer, brought by a tenant against his sub-tenant, evidence is admissible to show, that the plaintiff's term hav-

THE proof, on the trial of this case of forcible detainer, was, that Elms entered as tenant under Randall; refused to restore the possession to him, and claimed to hold under a contract with Breckenridge, or under his permission to occupy. Under this proof, as Elms could not legally attorn to Breckenridge, there can be no doubt that the verdict and judgment were correct.

Elms, however, offered to prove, that Breckenridge had been long possessed of the premises, and had leased them to Gibbins for a term which had expired before the suing out of the warrant; that Gibbins had sold out his lease to Randall, who, after purchasing from Gibbins, set up a title in himself, independent of and adverse to that of Breckenridge. The court would not permit Elms to prove these facts, and he excepted, and now assigns for error, the rejection of the proof.

It ought to have been admitted. If Breckenridge leased to Gibbins, and if Randall came in under Gibbins, as purchaser of his term, then Randall was the subtenant of Breckenridge, and could not lawfully assert an independent title, so as to make his possession adverse to Breckenridge. If, in this state of case, Randall put Elms into possession for the residue of the term of Gibbins, or even after the term had expired, Elms would hold in the same manner that Randall, his lessor, held: to wit, under the title of Breckenridge; for Randall cannot change the nature of his possession, acquired under the contract with Gibbins, by transferring his possession to a tenant. Under this view, the possession of both Randall and Elms is the possession of Breckenridge. Now, if Breckenridge, after the expiration of

his lease to Gibbins, entered upon the land with the consent of Elms, and not by force, (Elms being at the time the occupant in fact,) and executed a new lease to him, Elms may continue to hold under that lease, and is not bound to restore the possession to Randall, and is, therefore, guilty of no wrong in holding over as against Randall. And if no new lease was executed, Elms is not bound to restore the possession to Randall, unless it appears that he positively stipulated to do so. In that event, he might be bound by his agreement to make restitution to Randall, provided Breckenridge did not acquire the actual possession before an attempt on the part of Randall to coerce restitution. But if Breckenridge took the actual possession, and retained it, or put another tenant upon the land, Randall could not gain the possession from Breckenridge, or his tenant, merely because he had, in the agreement with Elms, stipulated that he should restore the possession to him. The following case will illustrate the whole doctrine. A leases to B for four years. B enters, enjoys for one year, and then sells the residue of his term to C, who, after entry, claims adversely to A, (which the law will not allow,) and leases to D, who is found in actual possession when the lease to B expires. Now A is unquestionably entitled to the possession, and may have his writ of forcible detainer against D, if he holds over. Suppose D yields the possession peaceably, and A takes possession himself, or puts E in possession as his tenant, can C regain the possession from A or E, because he required D to stipulate for its restoration to him? Certainly not; because, in such a case, the statute has not been violated. A, or his tenant, enters peaceably, as they had a right to do, and the original lease having expired, and the paramount landlord having regained the possession, there can be no tortious holding over within the view of the statute. If the covenant of D to restore the possession to C, in such a case, is worth any thing, it must be compensated in damages. If the paramount landlord again puts D in possession, after the expiration of the lease to B, the condition of D is as good, notwithstanding his covenant to restore to C, as the condition of E would be.

Spring Term
1834.

Elms
vs.
Randall.

ing expired, his lessor (the paramount landlord) had entered, and had leased the land to the defendant—who is, therefore, not bound to restore the land to the plaintiff.

Spring Term
1884.

Anne Jenkins
vs.
Jenkins' heirs

C has no remedy under the statute to regain the possession. The paramount landlord's original claim having expired, and the possession thereafter being peaceably restored to him, effectually terminates the relations subsisting between his subtenants as it regards the possession of the land, and no one of them, under pretence of being the landlord of another, can complain that the paramount landlord has entered, or holds over against his will. It is not a case of disseizin on the part of the paramount landlord. It is not like the case of *Chiles vs. Stephens*, 3 *Marshall*, 345, or the other cases cited.

The evidence offered was improperly excluded, because it might have shewn such a state of facts as would have authorized the jury to find for Elms.

Wherefore, the judgment is reversed, with costs, and the cause remanded for a new trial.

CHANCERY. *Anne Jenkins against Jonathan Jenkins' Heirs.*

[Mr. Anderson for Plaintiff: Mr. Crittenden for Defendants.]

FROM THE CIRCUIT COURT FOR GARRARD COUNTY.

April 19. Chief Justice ROBERTSON delivered the Opinion of the Court.

The question to
be decided.

THE only question in this case, is, whether Anne Jenkins is entitled to dower in the estate of Jonathan Jenkins, deceased, with whom she intermarried after it had been ascertained, by regular inquisition, that he was of "*unsound mind*," and with whom she continued to cohabit from the date of the marriage until his death, although he continued, as is alleged and not denied by her, to be of unsound mind, without any lucid interval, from the date of the inquisition.

She insists, first, that there is no sufficient proof of his incapacity; second, that mere unsoundness of mind will not avoid a contract of marriage, and that the wife of even an idiot is entitled to dower.

First. The alleged unsoundness of mind at the date of the union, and the continuation of that unsoundness until dissolution, must be deemed to have been admitted by the answer to the bill filed in this case for distribution. To that bill, Anne Jenkins merely says, that she "admits that she was the lawful wife of Jonathan Jenkins, deceased, at the time of his death ; she therefore, as such, insists upon her right to dower."

Now the bill, not only did not suggest that she was the lawful wife of Jonathan Jenkins, but averred that she never was his wife ; and, after setting forth the inquisition and the appointment of a committee, alleged, as before stated, that he was never restored to soundness of mind. Such a response, to such allegations, must be deemed a tacit admission of their truth. And, consequently, this court cannot presume, even were such presumption allowable were there no evidence but the inquisition, that Jonathan Jenkins, at any time after the marriage or the inquisition, could, by cohabitation and recognition or otherwise, have become a husband *de jure*, or *de facto*. The alleged unsoundness of his mind must, therefore, be deemed to have been conclusively established.

Second. The terms "*of unsound mind*" have a determinate and technical import, and which is very comprehensive. They do not (when used in a legal sense,) mean imbecility of mind merely, but are synonymous with *non compos mentis*, and import necessarily "*a total deprivation of reason*," comprehending idiocy, lunacy and adventitious madness, either temporary or permanent—remediable or irremediable. See the fourth, fifth and sixth numbers of the *Law Library*, containing a late "practical treatise on the law concerning lunatics, idiots, and persons of unsound mind—by Leonard Shelford."

Thus understanding, as it is our duty judicially to understand, the phrase "*of unsound mind*," when used in the inquisition, and in the bill, we come to the

and continued cohabitation till death, with one in that condition, will not constitute a legal marriage; nor give claim to dower, or courtesy, in his, or her, estate.

Spring Term
1834.

Anne Jenkins
vs.
Jenkins' heirs

The bill charges that a man was of unsound mind at the time of his marriage, and so continued till his death : the answer, passing by the gist of the charge, "admits that she was his lawful wife at the time of his death, and therefore, as such, insists upon her right to dower :"—allegation of the bill taken *pro confesso*.

The terms "*of unsound mind*" or *non compos mentis*" imply a total deprivation of reason, idiocy, lunacy, or any other description of madness.

A person of unsound mind can not be married. The performance of a marriage ceremony constitute a legal

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1884.

Anne Jenkins
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Jenkins' heirs

question—can a person, whilst in such a state of mind, make a contract of marriage that will be effectual for any legal purpose? If we consult reason, analogy, or law, the answer must be *no*.

A contract is the agreement of minds. If there be no reason, or volition, there is no mind which can make a valid agreement. A person of “unsound mind,”—an idiot, for example, is, as to all intellectual purposes, *dead*; and such a being, destitute of intellectual light and life, is as incapable as a dead body of being a husband or a wife, in a legal, rational or moral sense.

We know that Lord Coke (1 *Thomas' Coke*, 662,) said—“the wife of an idiot shall be endowed.” But, in a note, the editor says, that such is not *now* the doctrine of the courts. It is not improbable, that this inconsistent and anomalous doctrine in Coke, was superinduced, chiefly, if not altogether, by the literal and absurd interpretation which had once been given to a statute of 32 H. 8, which declared that, “*no prohibition, God's law except, shall impeach any marriage without the Levitical degrees.*” The courts having, at first, construed this statute to mean (what it was never intended to mean,) that all marriages, except such as were within the Levitical degrees, were good and valid, necessarily concluded that an idiot might lawfully marry. But this unreasonable doctrine has been supplanted by one that is more just and rational, and which is altogether consistent with the harmony and dignity of the law as a whole and as a science. Marriage is now deemed, in all respects, a civil union, depending on contract, express or implied, and requiring the exercise of reason. Thus it is said of a woman claiming dower, “she must have been the wife of a person who, at the time of the marriage, was of sound mind, as a man of unsound mind is incapable of contracting, although in the time of Lord Coke the law was held otherwise.” *Clancy on Rights*, 197. According to the civil law, the marriage of a person of unsound mind was, like other verbal agreements, void; and such, too, is the modern doctrine of the common law. 1 *Black. Com.* 438. 1 *Roll. Abr.* 357. *Wight-*

man vs. Wightman, 4 *Johnson's Chy. Reps.* 343. As a necessary deduction, courtesy and dower must fail when there had been no marriage. 1 *Vern.* 10. *Plowden*, 263, *b.* *Law Library*, No. 5, 288, and *Clancy*, *supra*.

We do not deem it necessary to the destruction of a claim to dower, asserted in consequence of an alleged marriage with a man destitute of reason, that there should be a decree of nullification in his life time. For his heirs and distributees may incidentally impeach the marriage, and have its validity and effect judicially settled, in a suit in chancery for dower or for distribution, whenever any claim is asserted to any portion of his estate in virtue of an alleged marriage with him.

Unless the woman claiming dower had been the wife of the man in whose estate she claims it, she cannot be entitled to it. She could not have been his wife, unless, during their cohabitation, he had made with her a contract of marriage *in presenti*. Unless he had reason, or in other words, a sound mind, it was impossible for him to have made such a contract. His incapacity may be asserted by his heirs and distributees, in consequence of their privity; and whenever the fact is satisfactorily established, in an appropriate mode, and in the proper form, all claim to dower must necessarily fail.

A suit in chancery for dower, or for partition or distribution, presents a fit and proper occasion for trying the existence, or non-existence, of an alleged marriage with the person whose estate is the subject matter of the suit.

Wherefore, it is the opinion of this court, on the facts as exhibited by the record, that the circuit court did not err in disregarding the claim of Anne Jenkins to dower in the estate of Jonathan Jenkins, and consequently the decree of that court must be affirmed.

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1834.

Anne Jenkins
vs.

Jenkins' heirs

Where a claim or defence depends upon the question, whether a person was of sound or unsound mind, at the time of his marriage, it is not necessary that there should have been a decree of nullification in his life time: the question may be made and decided in a suit for dower, for distribution, or the like.

Spring Term
1884.

PET. & SUM.

Cotton vs. Edwards.

[Mr. Richardson for Plaintiff: Mr. Crittenden for Defendant.]

FROM THE CIRCUIT COURT FOR WOODFORD COUNTY.

April 19.

Judge UNDERWOOD delivered the Opinion of the Court.

If the holder of a note, or bond, alters, or adds to it, without the consent of the obligor, he destroys its efficacy — which can never be restored without the concurrence of the obligor — erasing the alteration or addition will not do it.

BUFORD AND EDWARDS executed their note to Cotton, who, thereafter, without the privity, consent or authority, of Edwards, made an addition to the note above the signatures of the drawers to this effect: "this note shall bear interest from this date at twelve per cent." Afterwards, the addition was erased, and suit brought on the note. The question is, whether such addition and erasure destroyed the note.

So long as the addition remained, there can be no doubt, that the note, according to its import, was not obligatory on Edwards. When the addition was erased, did that circumstance impart validity to the note? An obligation once destroyed, so that it is no longer binding, cannot, in the nature of things, be resuscitated without the consent of the obligor. It must be done by a new contract to which the obligor is a party.

The case of *Letcher vs. Bates*, 6 J. J. Mar. 525, shews what acts will vitiate a deed.

Judgment affirmed, with costs.

ORDER.

Lane's Will.

[Mr. Draffin for Plaintiff: Mr. Richardson & Mr. Crittenden for Defendants.]

FROM THE ANDERSON COUNTY COURT.

April 19.

Judge UNDERWOOD delivered the Opinion of the Court.

The will was proved and admitted to record in the coun-

A paper purporting to be the last will and testament of Edward Lane, deceased, was proved and admitted to record in the county court clerk's office of Anderson.

Watts &c. prosecute a writ of error with a view to set aside the order of the county court, establishing the will, and directing it to be recorded.

The original will is lost. The executors therein named, and the clerk of the court in whose office the law directs the original to be kept, state on oath, that they know not what has become of it. The only question worthy of consideration, under such circumstances, is, whether this court, on the production of a sworn copy, and in the absence of the original, should receive proof of the due execution of the original, and affirm the order of the county court.

We cannot hesitate to dispense with the production of the original will, and to receive proof of its due execution. The law does not require impossibilities. Accidents ought not to destroy the rights of parties. It does not appear to be the fault of the executors, or of the clerk, that the original is not produced, and as its execution, in conformity to the requirements of the statute, has been duly proved, the order of the county court must be affirmed, with costs.

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1834.

Mason et al.

vs.

Jouett's adm.

ty court; and afterwards (without fault of the ex'or or clerk) was lost. Upon the trial of a writ of error brought to reverse the order establishing the will, a sworn copy being produced, this court dispensed with the production of the original, received proof of its due execution, and affirmed the decision of the county court.

Mason et al. vs. Jouett's Administrator.

Scire Faciās,

[Mr. Haggin for Plaintiffs: no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR MONTGOMERY COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

April 21.

THE administrator of a judgment creditor covenanted with one of the joint defendants to the judgment, that, for a valuable consideration paid, he would not "levy, exact or collect," as to that defendant, any portion of the judgment. Does such a covenant operate as a release to all or any of the joint debtors? This is the only material question presented in this case.

A technical release to one of several who were bound *in solido*, whether jointly or severally, exonerates all the obligors.

a release to the covenantee; who, if sued, will be left to his action, for redress.

A release of one of several obligors exonerates the whole. A covenant never to sue a sole obligor, is, in effect, a release. But a covenant not to sue one of several joint obligors, does not exonerate the others; nor even operate as

Spring Term
1884.

Forman et al.
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A covenant never to sue a sole obligor, will, to avoid circuitry, be deemed a release of the obligation.

But a similar covenant with one of several joint obligors, should not be construed as a release of even the covenantee; because such an interpretation would frustrate the intention of the parties, and operate unjustly; for, if one of the joint obligors be released, no suit could be maintained against the others; and the inconvenience and circuitry incident to a suit on the covenant for a breach of it, would be far less unjust, and would be much more consistent with the intentions of the parties, than the constructive exoneration of all the joint obligors. In such a case, therefore, such a covenant will not be deemed a release.

The following authorities may sustain the foregoing positions. *Hodges vs. Smith*, Cro. Eliz. 623. *Clayton vs. Kynalston*, 2 Salk. 573. *Lacy vs. Kynaston*, 1 Id. Raym. 690, and 2 Salk. 575. *Chitty on Contracts*, 295-6. *Putnam vs. Lewis*, 8 Johnson, 304. *Kirby vs. Taylor*, 6 Johnson's Chy. Reps. 250-1. *Com. Dig. (Amr. Ed.) tit. Release*, 232. *Ward vs. Johnson*, 6 Munford, 6. 1 Munford, 45.

Wherefore, as this opinion accords with that of the circuit judge, the judgment is affirmed.

EJECTMENT.

Forman et al. vs. Ambler.

[Messrs. Morehead and Brown and Mr. Hord for Appellants: Mr. Crittenden for Appellee.]

FROM THE CIRCUIT COURT FOR MASON COUNTY.

April 22.

Chief Justice ROBERTSON delivered the Opinion of the Court.

The titles of the parties, respectively.

THIS appeal is prosecuted to reverse a judgment of eviction, obtained, in an action of ejectment, by Ambler against Forman and others.

Ambler claimed, by deed, under the junior patent of Thomas Marshall, and relied for success on an alleged adversary possession for more than twenty years prior to the institution of the suit.

The appellants claim, by deed also, under the senior grant of Triplet and Crutcher; and insist that there was no such continuity of adversary possession as could have tolled their right of entry; and that, moreover, the circuit court erred in giving instructions to the jury, and therefore erred in overruling a motion for a new trial.

In revising the judgment, we shall consider the two general propositions thus presented by the motion for a new trial: that is,—first, did the proof authorize the verdict? Second, did the circuit court err in any of its instructions?

First. As to the adversary possession, the facts are, in some respects, not perfectly clear or satisfactory. But a careful survey and analysis of all the circumstances embodied in the bill of exceptions, tend to the conclusion that, whatever may be the actual state of the case, the jury had a right to infer, that Richard Wood and another had, prior to 1790, leased the sixty acres of land now in controversy, from the patentee; that they placed Philip Donaphan on the land, in the year 1790, as a subtenant; that Daniel Carrol bought the lease of Wood &c. and settled on the land in 1796, Donaphan still living in the cabin which he had built when he first entered, and continuing to live therein as Carrol's tenant for sometime after 1796; that Carrol continued to reside where he settled in 1796, until his death since 1803; that, in the fall of the year 1803, Samuel Hardy moved into Donaphan's cabin, then vacant, and, shortly afterwards, leased the sixty acres from Thomas Marshall, junior, the son of the patentee, and who had authority to lease; that about six years prior to the expiration of his lease, (which was for ten years,) he sold his term to one Phillips, who entered immediately, and, by agreement, was to occupy his place in all respects, under the lease from Marshall; that Phillips removed from the state within about eight months after he had entered on the land; that one Robinson, shortly afterwards, occupied it for

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decided.

Recital of evidence—which, tho' it does not show that there were not intervals between the periods during which different tenants occupied,—is, yet, held sufficient to authorize a jury to infer, that the party's possession was unbroken for 20 years or more,—and sustain the verdict.

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about six months, and was succeeded by one McKnight, who soon left the place, and was succeeded by James Gill, who deemed himself to be the tenant of Marshall, and continued to occupy the land until the spring of 1813, when, a short time before the expiration of Hardin's term of ten years, he (Gill) sold out to Galbreath, who has resided on the land ever since.

Although these facts do no shew *certainly* how the land was held after Donaphan moved off, and before Hardy entered, or how either Robinson or McKnight entered, yet, a proper consideration of the whole mass of circumstances authorized a jury to find that the possession was never *derelict*, or, in other words, that, at all times, there was such occupancy as would have authorized an action of ejectment on the elder patent.— And whether Kercheval, who claimed under a deed from Triplet and Crutcher, and conveyed to Forman, should be deemed to have done any thing which, in fact or in law, interrupted the adversary possession of the sixty acres, or any portion thereof, prior to the year 1816, when he placed a tenant within its limits, is also a question which a jury might, without control or rebuke, have decided favorably to the interest of the appellee. And therefore, as more than twenty years had elapsed from 1790 to 1816, and as we are of the opinion that, whatever might be the tendency of preponderating probability, the jury had a right to find, that the possession, from 1790 to 1816, was adversary and unbroken,—the first ground for a new trial should not have prevailed, even though the court might have been inclined to a different deduction from the facts.

Instructions, that "if the jury believed that T. M. and those claiming under him were in *possession* of the land in controversy *more than 20 years*, before they were divested" &c. held to be erroneous — because not suffi-

Second. But we are disposed to think that the circuit court erred in instructing the jury, that, "if they believed that Thomas Marshall and those claiming under him were in the possession of the land in controversy more than twenty years before they were divested of the possession by a legal entry, the plaintiff (could) maintain his ejectment, and recover, though the defendants claim under the eldest patent."

We do not doubt, that this instruction, as understood by the court and the parties, is free from legal excep-

tion. But understood as the jury, unacquainted with the true legal doctrine, had a right to understand it, the instruction is erroneous. First. The instruction, as given, does not necessarily, or by strong implication, import that the possession must have been adverse. Second. It does not necessarily mean that the possession must have *continued, without interruption*, for twenty years. Such a comprehensive and unqualified generality—and especially when applied to such facts as those exhibited in the bill of exceptions—might easily have deluded and misled the jury; and may thus have produced a verdict different from that which might have been the fruit of an instruction presenting the law with proper precision.

As this court cannot know what effect the instruction had, and as it *may* have operated injuriously, we feel constrained to reverse the judgment of the circuit court, and remand the case for another trial.

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ciently explicit,
(as 'the possession' must have been adverse & continual,) and may have misled the jury.

Eads vs. Rucker.

TRAVERSE.

[Mr. Crittenden for Appellant : no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR JEFFERSON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

April 23.

THREE questions will be considered in this case:—

First. Can a joint tenant maintain a warrant against his co-tenant for a forcible detainer?

Second. What should be the form of the warrant, and the character of the judgment for restitution, in such a case?

Ejectment may be maintained against a joint tenant by a co-tenant—and so may a warrant of forcible entry and detainer, when there

has been a disseizin by actual force.—The warrant, in such case, may be in the usual form—the judgment must be for the undivided interest.—A warrant for a forcible entry and detainer will lie only against a party in possession at its date—not against one who does not in fact hold the land.

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Third. Can a warrant for forcible detainer be maintained against a person who was not in possession at the date of the warrant, and who had never been the tenant of the plaintiff?

I. Ejectment may be maintained by one joint tenant against a co-tenant for an actual disseizin; and no reason can be perceived why a warrant for a forcible detainer may not be maintained between the same parties. A warrant for a forcible detainer may be maintained although the relation of landlord and tenant did not exist between the parties; but then actual force must be proved. *Cammack vs. Macy*, 3 Mar. 297.

II. A warrant in favor of one joint tenant against another, may be in the form prescribed by the statute. It is not necessary that the warrant should describe the precise character of the possession. But the judgment for restitution should be—according to the right established by the inquisition—for an undivided interest.

III. A warrant for a forcible detainer cannot be maintained against a person who was not in fact forcibly detaining when it was issued; but it should always be brought against the person who, at its date, was in the actual possession of the thing detained.

As, in this case, Oliphant, and not Eads, was, at the date of the warrant, in the possession of the house which is the subject matter of this controversy, the judgment against Eads, for restitution, cannot be sustained.

Wherefore, without noticing any other objection, the judgment must be reversed, and the cause remanded.

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CHANCERY.

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99 22*Vaughan against Myers &c.*

[Mr. Monroe and Mr. Chapeze for Plaintiff: Messrs. Sanders and Depew for Defendants.]

FROM THE CIRCUIT COURT FOR BULLITT COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

VAUGHAN purchased, paid for, and received from the sheriff, a conveyance for a tract of land, sold, by metes and bounds, under an execution against Myers; both the sheriff and Myers having represented, on the day of sale, to the bidders, that those bounds included certain improvements and cleared land; none of which, as was subsequently ascertained, were included. Vaughan filed his bill to be relieved from the purchase thus made through the mistake or misrepresentation of Myers and the sheriff, and to compel Myers to pay him the money he had paid on account of the purchase. The court dismissed his bill, without prejudice to an action at law, and from that decree he prosecutes this writ of error.

We think so material an error, as to the thing bought at sheriff's sale, produced by the representations of the defendant in the execution, a very sufficient reason for relieving the purchaser, by setting aside the sale; and that a bill in equity, if not the only, is the most appropriate remedy for obtaining such relief. As Myers is shewn to be insolvent, we also think it proper to allow Vaughan the benefit of a lien on the land conveyed to him, to secure the payment of the sum paid by him to the sheriff.

As the relief sought in the amended bill was against Myers alone, it was unnecessary to bring the plaintiff in the execution before the court.

Decree reversed, with costs, and cause remanded, with directions for a decree rescinding the sale and conveyance to Vaughan, and for a sale of the property so conveyed in satisfaction of the sum paid by Vaughan to the sheriff, with interest thereon to the rendition of the decree; and if the property should not produce enough to satisfy that sum, then a decree in favor of Vaughan, against Myers, for the residue.

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At a sale of land under ex' on, the debtor and the sheriff represented that certain improvements were within the bounds of the tract put up and sold; which not being the fact, the purchaser was deceived:—held that the best, if not the only, remedy for him, is in chancery; that he may there have a rescission of the contract, and restoration of the purchase money—with interest: that he may assert a lien on the land—the execution debtor being insolvent; which may be sold; and if the proceeds fall short of what the complainant is entitled to, he may have a decree, against the execution debtor, for the balance. No relief being prayed against the plaintiff in the execution, he is not a necessary party.

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DEBT—for a *devastavit*. Tilford et al. vs. The Bank of Kentucky.

[Mr. Chapeze for the Plaintiffs: Mr. Crittenden and Mr. Charles A. Wickliffe for Defendant.]

FROM THE CIRCUIT COURT FOR BULLITT COUNTY.

April 25. Chief Justice ROBERTSON delivered the Opinion of a majority of the Court—Judge Nicholas dissenting.

Notes discounted by the Bank of Kentucky, are placed upon the same footing with foreign bills of exchange, as to the remedy, and its effects, against the drawers and endorsers—and them only: so that actions of debt may be brought against the drawers and endorsers jointly, or any one of them separately. But the representatives of a deceased drawer or endorser can not be joined with the survivors.

Nor does the 3d sec. of the act of '98—which gives to *protested* foreign bills the dignity of judgments, and requires executors and administrators to suffer judgment to pass upon such bills, before any bond, bill or other debt of equal

THE President, Directors and Co. of the Bank of Kentucky having obtained a judgment against the administrators and heirs of John Read, deceased, on a note which he, as principal, and others, as his sureties, had given to the said bank, in September, 1823, and a *fiери facias* on the judgment having been returned *nulla bona*—this suit was brought against the said administrators and their sureties, for a *devastavit*.

On the trial, the circuit court instructed the jury, in effect, that, in the administration of the assets of the deceased obligor, his note to the bank was, by law, entitled to the priority of a judgment, and that, therefore, if the administrators, knowing that it existed and was unpaid, had discharged notes which were due from the intestate to natural persons, they had, to that extent, been guilty of a *devastavit*.

That instruction presents the only important question upon this writ of error, prosecuted to reverse the judgment which was rendered against the administrators and their sureties.

The instruction cannot be maintained, unless there be some statutory enactment which imparted to notes made payable to the bank, a factitious dignity, and a precedence in the order of administration, beyond what they can be entitled to claim according to the doctrines of the common law.

The following extracts will exhibit all the statutory law that can operate directly on the present question.

First. "It shall be lawful for any person or persons having right to demand any money upon a protested foreign bill of exchange, to commence and prosecute an action of debt, for principal, interest, and charges of protest, against the drawers and endorsers jointly, or against either of them separately; and judgment shall and may be given for such principal, charges and interest, after the rate of ten *per centum per annum*, as aforesaid, to the time of said judgment, and legal interest upon the money recovered until the same shall be fully satisfied." *2nd Section of an Act of 1798, 1 Dig. 192.*

Second. "All foreign bills of exchange which are or shall be protested, shall, after the death of the drawer or endorser, be accounted of equal dignity with a judgment, and the executors or administrators of every such drawer or endorser shall be compelled to suffer judgment to pass against them, for all debts due upon protested foreign bills of exchange, before any bond, bill or other debt of equal or inferior dignity, under the penalty of being liable to pay the same out of their own proper goods." *3rd Section of the same Act of 1798.*

Third. A portion of the thirteenth section of the act incorporating the Bank of Kentucky. *1 Dig. 144.*—"And all notes or bills at any time discounted by the said corporation, shall be, and they are hereby, placed upon the same footing as foreign bills of exchange, so that the like remedy may be had for the recovery thereof, against the drawer or drawers, endorser or endorsers, and with the like effect, (except so far as relates to damages,) any law, custom or usage to the contrary notwithstanding."

As bills of exchange are mercantile paper, regulated by a peculiar code of the common law, denominated the *lex mercatoria*, there may have been an adequate and consistent reason for giving to "*protested*" foreign bills of exchange (as the third section of the act of 1798, *supra*, did give,) the effect of judgments, as to the administration of the assets of a deceased drawer or endorser. And, as it was proper to impart negotiability to notes discounted by the Bank of Kentucky, there was some just and consistent reason for placing them on the

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or inferior dignity apply to notes discounted by the Bank of Ken. An executor or administrator may pay other bonds or notes, in preference to those discounted by the bank, without being guilty of a *devastavit*. [Judge Nicholas of a different opinion. See page 122.]

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footing of foreign bills of exchange as to the remedy and the effect of that remedy—so that the same remedy might be pursued on a discounted note, as that which was allowed, by law, in a parallel case, on a foreign bill; and consequently, in that respect, and to that extent, the thirteenth section of the bank charter applied to protested notes the second section of the act of 1798, respecting the remedy and the effect of the remedy on protested foreign bills of exchange. But, in other respects, it would be difficult to imagine any sufficient motive for placing notes of the bank on higher or better ground than that on which domestic bills of exchange had been placed. And, perceiving no motive of policy or justice for imputing to notes due to the bank, the dignity of judgments, in any case, or for any purpose, we are not inclined to extend, beyond its plain import, the provision quoted from the thirteenth section of the charter; more especially as that import is fortified by some extraneous considerations. The literal and grammatical interpretation of that provision, taking it altogether, and giving a consistent operation to every part of it, is, that, as to the “remedy” against “drawers and endorsers,” and as to the “effect” of that remedy against them, (damages excepted,) and as to that remedy and its effect only, notes discounted by the bank were placed on the footing of *protested* foreign bills of exchange.

The language of the provision is not, that notes, when discounted by the bank, should be placed on the footing of *protested* foreign bills of exchange; nor is it, simply and alone, even that such notes shall be placed on the footing of foreign bills of exchange; but it is, that they shall be placed on the footing of “*foreign bills of exchange*,” with a specified restriction, and for a special purpose. Had the legislature intended to place those notes on the footing of *protested* foreign bills, in all respects, the word *foreign* would have been inserted, and nothing should have been added to what would then have been the legislative declaration—“shall be placed on the footing of *protested*, foreign bills of exchange.” Had such been the intention of the legislature, such a provision would, without obscurity or doubt, have ex-

pressed it, and then every word would have had an essential and consistent operation. But such is not the language of the legislature; it is essentially of a different character and import. Not only is the important word "*protested*" left out, (and doubtless with design,) but a special qualification is added—"so that" &c. This addition cannot be deemed mere supererogation. Judicially, it should be deemed necessary for expressing the true legislative intention; and it is our duty to give it some effect. Why, then, was it inserted? and what should be its effect? Supposing that it was added for some practical purpose, and was understood by the legislature, (as we should suppose,) but one answer can be given to these questions, and that is, that it was intended to qualify the antecedent part of the enactment, and to shew, that it was not the intention of the legislature to place the notes of the bank on the footing, in all respects, of foreign bills of exchange; and also, to shew to what extent they were to stand on the same ground. Had nothing more been said, than that such notes should "be placed on the footing of *foreign bills of exchange*," the third section of the act of 1798 (*supra*,) would not have applied, because that section gives the dignity of a judgment (in the administration of assets,) not to foreign bills of exchange merely as such, but only to "*protested*" foreign bills. Nor would the second section of that act, as to the remedy on protested foreign bills of exchange, have been applicable to the notes of the bank, had the legislature provided only that they should stand on the footing of merely "*foreign bills of exchange*." But the chief object of the enactment was to prescribe for notes discounted by the bank, the same remedy which was applicable to foreign bills of exchange; and therefore, lest it might be inferred that the notes of the bank were placed, in all respects, on the footing of "*protested*" foreign bills of exchange, the legislature declared, that they should be "placed on the footing of *foreign bills of exchange*;" and lest the remedy contemplated would not have been deemed applicable had nothing explanatory, or more explicit, been said, the legislature added, "so that the like remedy may be had for the recovery

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thereof, against the drawer or drawers, endorser or endorsers, and with the like effect &c." *This latter provision* should be construed as comprehending *protested* foreign bills, because it would be difficult to imagine a state of case analogous to the liabilities of parties to the notes of the bank, in which a suit could be maintained on a foreign bill, unless it had been protested. But this provision as to remedy against drawers and endorsers, should not be construed as placing notes of the bank on the footing of *protested* bills of exchange, for any other purpose than the remedy, and that, too, against drawers and endorsers only ; and nothing preceding that provision had placed notes of the bank on the footing of *protested* foreign bills. The words "*and with the like effect*" evidently refer to the antecedent provision—"so that the like remedy for the recovery thereof, may be had against the drawer or drawers, endorser or endorsers", and mean precisely what they would import had they and "*the like remedy*" been placed in juxtaposition, so as to read, "so that the like remedy and with the like effect may be had against endorser and endorsers &c." And thus it may be made manifest, that the words "*and with the like effect*" refer to the remedy, and not to the note.

This literal and grammatical deduction, so obvious and inevitable, is fortified by another consideration.—The parenthetical words "*(except as to damages,)*" tend to shew that, by the expressions "*and with the like effect,*" the legislature meant the effect of a suit on a protested foreign bill of exchange. "*The like remedy*" is action of debt against all the endorsers and drawers, jointly, or against any one of them separately. And the effect of that remedy, as prescribed by the second section of the act of 1798, is, that the note shall not be impeachable by an endorser or drawer, otherwise than a protested foreign bill might be impeached, and that principal, interest and *charges of protest*, may be recovered from all or any one of the drawers and endorsers.

Thus every word of the provision quoted from the thirteenth section of the charter of the bank, may have a full and consistent operation by restricting their ap-

plication to the second section of the act of 1798 ; and neither the letter of the provision, nor the utility and harmony of its parts, will authorize a construction that will embrace the third section of that act, giving to protested bills of exchange the dignity of judgments. There is no analogy between the thirteenth section of the charter, and the act of 1812, elevating certain unsealed writings to the dignity of sealed instruments.—The latter places the unsealed on the footing of sealed contracts in *all respects*—to be entitled to the same *consideration and effect*, and to be the foundations of the same form of action. This creates a perfect parallelism in every essential particular ; and the enactment contains nothing incongruous or restrictive. There is not a word in the thirteenth section of the charter, that imports an intention to extend, beyond the *remedy by suit against drawers and endorsers*, the similitude between notes discounted by the bank, and protested foreign bills of exchange. This should be deemed sufficient. But there are some negative considerations which fortify the conclusion thus deduced from the words of the thirteenth section. The remedy of which it speaks, is a remedy against *endorsers and drawers* only, and undoubtedly refers to that prescribed by the second section of the act of 1798. *That* remedy, and with the same effect, does not apply to a personal representative of a drawer or endorser : first, because the thirteenth section of the charter restricts it to drawers and endorsers ; second, because a joint suit against such personal representative, and a surviving drawer or endorser, could not be maintained ; third, because the remedy by suit, and the effect of such remedy, as provided for by the second section of the act of 1798, and by the thirteenth section of the charter, even if they applied to a personal representative of a drawer or endorser, can have no connection with the third section of the act of 1798, which gives to protested foreign bills of exchange the dignity of judgments, as against executors and administrators, *without regard to any suit, and, of course, before suit*. The second section of the act of 1798 has no effect on the relative dignity of protested foreign bills,

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in the administration of assets ; it applies only to the remedy and the effect of the remedy by suit, on such bill, against the drawer and endorser. The thirteenth section of the charter of the bank, like the second section of the act of 1798, applies only to the remedy, and the effect of the remedy, on the note against drawer and endorser, and does not affect, or attempt to affect, the dignity of the *note* without suit and as against administrators and executors in the administration of assets. There is nothing in the thirteenth section of the charter, any more than there is in the second section of the act of 1798, which alludes to the dignity of a protested note or bill in the order of administration; and it would be difficult to give it such a construction as to produce such an effect ; indeed, it could not be done consistently with the right rules of philology, or with the presumption that the legislature understood the import of its own language, and deemed the words which have been adopted, necessary and proper, to express the true intention of the enactment.

But were it admitted that the true import of the thirteenth section is doubtful, even then we should not be inclined to adopt, by any doubtful process, a construction that would give to notes discounted by the Bank of Kentucky, the dignity and effect of judgments, in the administration of assets. Before we would attribute to them such character and privilege, we should be thoroughly convinced that the legislative will, plainly expressed, has so directed.

The third section of the act of 1798 is explicit and unambiguous; and the charter of the Bank of the Commonwealth is equally so ; it declares that, "all such notes (meaning notes discounted by the Bank of the Commonwealth,) shall be debts of *superior dignity*, and shall be paid *first* by executors and administrators."— But nothing resembling this provision, or the second section of the act of 1798, can be found in the charter of the Bank of Kentucky. The only reasonable deduction from this circumstance is, that the legislature did not, in the one case, intend to do what, in the others, it thought proper to do, in a distinct, direct and expli-

cit enactment. Moreover, as the sovereign has a prerogative right to priority, there was an obvious and consistent motive for declaring, that notes discounted by the Bank of the Commonwealth should be paid first by administrators and executors. But no such motive applied to the Bank of Kentucky. The interest of the state in the stock of the latter was comparatively inconsiderable, and that interest it held as other individual stockholders.

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But whatever room there might have been for a diversity of construction, had no judicial interpretation been ever given by this court, to the thirteenth section of the charter of the Bank of Kentucky, all perplexing doubt should, in our judgment, be deemed to have been settled by the opinion of our predecessors, in the unreported case of *The Bank of Kentucky vs. Sturgus' Administrators*, decided in 1828. In that case, the court decided expressly, that notes discounted by the Bank of Kentucky, are not, by law, entitled to the priority of judgments, or any other priority, over other notes of equal natural dignity. One direct decision on such a question, should be satisfactory and conclusive. A personal representative would have just cause to complain, if this court should convict him of a *devastavit* for administering assets and paying debts according to the law as it had been expounded and settled by the same court. We would not, therefore, feel authorized to overrule the decision in the *Bank vs. Sturgus' Administrators*, even if the point decided were more doubtful than it is, or than it could be deemed to be, as an original and unsettled matter of construction.

Wherefore, it is the opinion of a majority of this court (Judge Nicholas dissenting,) that the judgment of the circuit court is erroneous, and should be reversed.

Judgment reversed, and cause remanded for a new trial.

JUDGE NICHOLAS, dissenting from the decision of the other members of the court, delivered the following Opinion.

THE principal question presented is, whether a note negotiable and payable at the Bank of Kentucky, and discounted by the bank, stands, as to priority over other

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debts in the settlement of a decedent's estate, upon the same grade with judgments.

This depends upon the proper construction of the following words of the thirteenth section of the charter of the bank, 1 Dig 144 :—

“And all notes or bills discounted by said corporation, shall be, and they are hereby, placed upon the same footing as foreign bills of exchange, so that the like remedy may be had for the recovery thereof against the drawer or drawers, endorser or endorsers, and with the like effect, (except so far as relates to damages,) any law, custom or usage to the contrary notwithstanding.”

The first section of the act of 1798, 1 Dig. 192, declares, that foreign bills of exchange shall, after protest, bear interest at the rate of ten *per centum per annum*.

The second section gives the action of debt on a foreign bill of exchange, for principal, interest and charges of protest, against the drawers and endorsers jointly, or against either of them separately; “and judgment shall be given for such principal, charges and interest, after the rate of ten *per centum per annum*, as aforesaid, to the time of such judgment, and legal interest upon the money recovered, until the same shall be satisfied.”

The third section says, that a protested foreign bill of exchange, after the death of a drawer or endorser, shall be of equal dignity with a judgment, and directs executors and administrators to permit judgments against them thereon, “before any bond, bill, or other debt of equal or inferior dignity, under the penalty of being liable to pay the same out of their own proper goods.”

If the charter of the bank had stopped after saying the notes discounted by it, should be placed “upon the same footing as foreign bills of exchange,” it would have been free from ambiguity, and there would have been no room left for any construction which would take from a discounted note, the dignity of a foreign bill, in the administration of a decedent's estate. But it is contended, that the succeeding words, “so that the like remedy may be had for the recovery thereof, against the drawers or endorsers, and with the like effect, (ex-

cept so far as relates to damages,)" do restrain the import of the preceding words, to the giving the remedy by action of debt allowed by the act of 1798, on foreign bills. This construction, which merely gives the remedy by action of debt, is obviously far short of the legislative intention, as it has always been understood and acted upon by the courts in numberless cases, recognising that the charter had imparted to a discounted note, the actual qualities of a bill of exchange, and, as an incident thereto, requiring protest and notice of non-payment, to fix the liability of an endorser, instead of the legal diligence, by suit, required in the case of ordinary promissory notes. This recognised quality or property of a discounted note could never have arisen from the giving of merely the same remedy by action of debt, allowed in favor of a foreign bill. The remedy so given neither imparted or took from a foreign bill that or any other quality. Notice of protest is still necessary. to a recovery on a foreign bill, notwithstanding that remedy is pursued; and as it is equally required in a recovery on a discounted note, the latter must have received from the charter some of the properties of a bill of exchange, over and above what the remedy merely could have imparted. As, then, the section must be so construed as to give a discounted note some of the qualities of a foreign bill, independent of the mere remedy, and as that effect is only given by the broad, comprehensive language placing them upon the same footing, it would seem necessarily to follow, that they must be treated as standing upon the same footing for every purpose, except so far as those who contend for a different construction, can restrain the assimilating process of the charter, by fair interpretation of some other restrictive words or expressions. The words, "and with the like effect (except so far as relates to damages,)" cannot be tortured into any such purpose. On the contrary, to give any operation to the words "with the like effect," they must be made to refer to the placing a note on the footing of a bill of exchange, and not to the remedy spoken of. To use the words, "except so far as relates to damages," for any such purposes, would violate the

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fundamental rules of all construction, which treat the exception of one thing as the implied inclusion of all other things not excepted, on the same principle that the enumeration of particulars is the exclusion of generals, and the mention of one thing is the exclusion of another.

Considering the large share which the state held in the stock of the bank—that is one half as originally contemplated by the charter—and the earnest desire which may well be presumed on the part of the legislature, to ensure the success of the first experiment of such an institution in our state, very adequate motives may well be inferred for the giving such dignity and priority to a discounted note ; and at the same time, a satisfactory reason is found for assimilating a discounted note to a foreign, rather than an inland, bill of exchange. On the other hand, the opposite construction, which restricts it of this effect, infers the absence of that heedful caution and monopolizing selfishness, which characterizes all legislation where the state involves its interests with those of individuals, and which our legislature can at no time be charged with having laid aside, but of which it subsequently shewed itself especially mindful, on the kindred subject of the Commonwealth's Bank.

The use of the superfluous language as to the remedy, is fairly ascribable to that superabundant caution, which frequently manifests itself in our legislative enactments, and is equally displayed, and in almost the identical same manner, in the act of 1812, placing unsealed, on the same footing with sealed writings.

As it was no part of the effect of the second section of the act of 1798, either to make that a bill of exchange which otherwise would not have been, or to give damages upon any bill which otherwise, without that section, would not bear them, the exception, stated in the charter, as to the effect of discounting a note, that damages should not be allowed thereon, as was allowed upon a foreign bill, conclusively shews the legislative understanding of the true import of the language used ; and that, but for that exception, a discounted note would for every purpose be placed upon the same foot-

ing as a foreign bill. It is equally manifest, from the fact of making such an exception, that the intention was, that a discounted note should, for every other purpose, stand, in all respects, upon the precise same footing as a foreign bill.

The idea of converting a promissory note into a bill of exchange, was no doubt taken from the statute of Anne. Indeed, from some of the phraseology of the thirteenth section of the charter, it is apparent, that the draftsman of the charter had that statute before him. The statute of Anne places assigned notes on the footing of *inland*, not of *foreign* bills. The distinction is an essential one in many respects. *Prima facie*, our legislature would also have preferred to place the notes discounted by the bank upon the footing of inland, rather than of foreign bills, in the absence of any controlling reason to the contrary. That reason, then, must be sought for. None has suggested itself, and it is believed that none, having even the semblance of plausibility, can be suggested, except that, according to the existing law, foreign bills had the dignity of judgments in the settlement of a decedent's estate; whereas, inland bills had no such dignity and priority. When it is recollected, that, according to the scheme of the charter, it was contemplated that the state was to own one half of the stock, an abundant reason is also found, why the foreign bill should have been selected, on that very account.

A loose note of an opinion by our predecessors, endorsed on the back of the record, in the case of the *Bank versus Sturgus' Administrators*, is relied upon, as establishing a different construction. It is difficult to ascertain from the language there used, whether it was thought, that the case necessarily turned upon the point now under consideration. But be that as it may, I cannot receive that case as a controlling authority, in opposition to the construction which, to my mind, is so indisputably the only legitimate one. The only reason assigned in that case, why the discounted note does not acquire the dignity of a judgment, is because the third section of the act of 1798 only gives that dignity to *protested* foreign bills of exchange, and the charter does

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not place the note on the footing of a protested foreign bill of exchange. I understand the word *protest*, as used in the act of 1798, to import nothing more than *dishonored*. Why should not the same remedy and the same damages be allowed on foreign bills, where no protest was necessary to a recovery, as where it was? There is no good reason for any such distinction; and the legislature should not be presumed to have intended any such. But concede, that the true construction is otherwise, and that the distinction was intended. That will not affect this question. If the charter placed discounted notes on the footing of foreign bills, except as to damages,—as one of the incidents of a foreign bill was, that, when protested, it held the dignity of a judgment,—so also it would seem necessarily to follow, that when the discounted note, having all the essential qualities of a foreign bill, was *protested*, that it, also, would then be raised to the same dignity. But this opinion, thus intimated in the *Bank versus Sturgus*, is in direct contravention of the uniform construction of the charter by both bar and bench, ever since its passage, and as has been recognised by our predecessors in numerous cases. The uniform habit, under the sanction of this court, has been to sue upon a discounted note, as a *protested* foreign bill, under the remedy given by the second section of the act of 1798, in debt, against all the parties, or either of them separately. Now, it is only upon *protested* foreign bills that this remedy is given by the act of 1798, and it can, with the same propriety, be contended that the charter does not apply to the second section, giving the remedy on a *protested* bill, as to the third section, which gives the accumulated dignity. There is no room or reason for distinction or difference between them. The charter does not give the remedy allowed on *protested* bills. The only way you obtain the remedy afforded by the act, is by shewing that the note is, by the charter, placed on the footing of a foreign bill; and then, because that remedy is allowed as incident to a foreign bill, to allow it, also, as incident to the note thus converted into a foreign bill.

The very same process of reasoning inevitably places it upon the same scale of dignity when protested. The case of the Bank *versus* Sturgus, standing, as it does, in such direct repugnance to a construction so long, and so well established, and so repeatedly recognised by the same judges, could weigh little, even if it had been discussed *seriatim*; but circumstanced as it is, it should weigh nothing at all as an authority.

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Boyce vs. Blake et al.

TRAVERSE.

[Mr. McConnel for Plaintiff: Mr. Crittenden for Defendants.]

FROM THE CIRCUIT COURT FOR GREENUP COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

April 25.

BOYCE purchased from Shrieve and Co., a tract of land, including a forge, and was put into possession. Afterwards, as it may be inferred from the evidence, he contracted with them, by parol, for a parcel of land adjoining his former purchase.

Shrieve and Co. owned three adjoining tracts, which may be designated by the names of the individuals from whom he purchased: to wit, Johnson, Young and May. It was the Johnson tract they first sold to Boyce. The subsequent parol contract embraced a part of the Young tract.

After the parol contract with Boyce, Shrieve and Co. sold to Blake &c. the Kentucky Steam Furnace and all the lands pertaining thereto. This sale included the May tract, and likewise the Young tract, as Blake &c. contend. Boyce, however, insists that a part only of the Young tract was sold to Blake &c., and that a line was run and marked, for the purpose of designating the boundary of the land sold by Shrieve and Co. to their vendees. Up to this line, so run, Shrieve and Co. conveyed to Blake &c., and put them in possession.

If a party holding a tract of land, acquires title *by deed* to an adjoining tract, his possession is presumed to be extended to the limits of his new purchase. *4th Mon. 442.* So also, altho' his new purchase was by an executory, parol contract, if he entered upon it, under the authority of the vendor, his possession will be held to include it, and he may maintain a writ of forcible entry and detainer, against an intruder.

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Boyce, under his parol contract, claimed the land up to the line run, as the boundary of the land sold to Blake &c. ; and the only question in the case worthy of consideration, is, whether Boyce had possession in fact of the land embraced by the parol contract, so as to enable him to maintain a warrant of forcible entry and detainer against Blake &c., who had removed a cabin across the division line as run, and taken possession on the side claimed by Boyce.

If Boyce, after the purchase of the Johnson tract, had acquired title to an adjoining parcel of land by deed, then his possession in fact would be extended to the limits of the additional parcel, upon the principles recognised in the case of *Cates vs. Loftus' Heirs*, 4 Mon. 442. Should this doctrine apply, so as to enlarge a possession in fact to the limits prescribed in an executory parol contract ? We see no reason why it should not. Here Shrieve and Co. were in fact possessed of the three tracts. The evidence conduced to prove, that they had sold, and put Blake &c. in possession of, the May tract, and so much of the Young tract as lay east of the dividing line, run and marked by the surveyor ; and that the possession of the residue of the Young tract, and the whole of the Johnson tract, had been transferred to Boyce. Whether the transfer to Boyce was by parol, or by deed, was a matter which, it seems to us, Blake &c. had no right to enquire into. The only proper enquiry was as to the matter of fact. Did Shrieve and Co. transfer the possession, or authorize Boyce to take possession, up to the marked line, on the west side ? And did Boyce actually enter upon the land within the Young tract, claiming to hold up to the dividing line, and intending to annex the land included in the parol contract, to the Johnson survey, and to extend his possession to the boundary of the parol contract ? If the jury upon the evidence could answer these questions in the affirmative, and if thereafter Blake &c. moved the cabin across the line, it amounted to a forcible entry upon the possession of Boyce ; for which he might sue out his warrant.

It does not require an actual improvement or enclosure to enable the plaintiff to maintain his warrant of forcible entry and detainer, as was decided in the case of *Wall vs. Nelson*, 3 Litt. 398.

The instruction given by the court was contrary to the foregoing exposition of the law.

Wherefore, the judgment is reversed, with costs, and the cause remanded for a new trial.

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No improvement, or enclosure, is necessary to enable a plaintiff to maintain a writ of forcible entry and detainer.

Barger vs. Caldwell.

COVENANT.

[Mr. Backner for Appellant : Mr. Monroe for Appellee.]

FROM THE CIRCUIT COURT FOR ADAIR COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

April 25.

THIS is an action, brought by the appellee, for the benefit of Wheat, on an indenture of apprenticeship, in which he obtained a verdict and judgment against the appellant.

The declaration sets forth the indenture, signed by plaintiff and defendant, "whereby the plaintiff, as clerk of the county court of Adair, by virtue of an order of said court, put Mason Wheat, a poor boy, as an apprentice to the defendant; with the defendant to dwell during the term of twelve years, or until the said Mason Wheat should arrive at the age of twenty one years; and during said term, the said Wheat, the said defendant, in all his lawful commands, well, gladly and truly to obey; and the said defendant, on his part, covenanted to teach and instruct the said Wheat, the art and mystery of the tanning business," with other usual covenants, as prescribed by the statute.

The declaration avers, that the term of apprenticeship has expired, and a failure of the defendant to comply with any of the said covenants on his part; but without any averment that Wheat had remained with

Suit, by an apprentice, in the name of the clerk, who, by order of court, had bound him, against the master, for failing to teach his trade to the apprentice. The indentures, declaration &c.

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Indentures of apprenticeship, stating that the apprentice had been placed in custody of the master, the presumption is, that he so remained during the term; and, in declaring against the master for failing to teach him, it is not necessary to aver, as the performance of a condition precedent, that he did so remain. If the apprentice, by absconding, or otherwise, prevented the master from teaching him, the master must show that defence by plea and proof.

the defendant during the term, or otherwise complied with any of the stipulations made, in his behalf, by the clerk.

For the want of such averment, it is contended the declaration is bad. We do not think so. The performance by the defendant, is not expressly based, by the terms of his covenant, upon the condition of a fulfilment of those stipulations on behalf of Wheat. The indenture recognises, that Wheat was placed in the possession of defendant, and as the law rendered it the duty of Wheat to fulfil those stipulations, and authorized the defendant to coerce a compliance with them, the rational and legal presumption is, that they were complied with. Consequently, there would be no propriety in construing by implication merely, those stipulations into a condition precedent, requiring an averment of their performance, before the plaintiff could shew a breach of the covenants, on the part of the defendant. It would seem more proper, that the defendant should avoid the effect of the presumption growing out of the transaction, and, by averment on his part, shew that the apprentice, by absenting himself or otherwise, had prevented him from performing his covenant, if such were the fact. Either of the stipulations may as well be treated in the nature of a condition precedent, as any of the others. But it would be manifestly improper to treat them all in that way. In suing on a covenant, which recognises the reception and hire of a slave for a given time, to clothe the slave and teach him something during that time, it surely would not be necessary to aver that the slave remained with the covenantor, in order to shew a sufficient breach of the covenant to clothe and teach. Neither can such averment be necessary here. For there must be here a similar presumption that the apprentice remained during the term with his master.

A bill of exceptions to a decision, that a particular question might be put to a witness, must show what testimony had been previously given—otherwise this court cannot say the question was improper.

In the progress of the trial, upon an issue of covenants performed, the court permitted the plaintiff to ask a witness, whether Wheat was a good workman in cur-

show what testimony had been previously given—otherwise this court cannot say the question was improper.

rying leather, and this permission is relied on as error. It might be a sufficient answer to this objection, that the bill of exceptions does not shew what proof had been given when the question was asked; so that it is impossible for us to say the court erred in permitting it to be answered, even though we should think it improper as original proof on the part of the plaintiff, under the issue.

But we do not see how such a question could have been illegal under any state of proof. It may be, as contended, that the art of currying is exercised in many places, as separate and distinct from the art and mystery of tanning. But it is certainly equally true, that, in others, they are blended and considered as but one trade; and the term tanning will include currying or not, in common parlance, or in contracts, according to the general practice of any particular community. The fact that the two are many times carried on together as one and the same trade, will at least warrant us in saying, that there is no absolute incompatibility in the idea of their being one and the same. If we are bound judicially to interpret such a covenant according to our knowledge of the general mode of conducting such business in this state, we should say that they are most generally blended, and that, according to common understanding, the trade and business of a tanner is the trade and business of making leather, which, as we believe, necessarily, or at least ordinarily, requires currying.

The court, at the instance of plaintiff, instructed the jury, "that, to understand the art and mystery of tanning, is to be a workman of as much skill as tanners generally possess who have regularly learned the trade;"—also, "that though defendant was not bound to make Wheat a first rate workman, yet he was bound to make him a workman as good and skilful as tanners generally are who have regularly learned the trade." To the first of these instructions we do not find any very just exception. The skill which tanners generally possess,

be able to learn the trade, this will excuse the master: but if such excuse exist, it is for him to aver and prove it; it will not be presumed in the absence of proof.

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The phrase 'the art and mystery of the tanning business,' will include the art of currying, or not, according to the general sense in the place where it is used. In this state, 'the tanning business' is generally understood as the entire process of making leather;—and, therefore, upon the trial here, of an issue, whether a covenant to teach that business, was performed, it is not improper to ask a witness whether the apprentice was a good workman in currying leather.

A covenant to teach an apprentice an art and mystery, binds the covenantor to make him as good a workman in the trade as those generally are who have regularly learned it. If, however, the apprentice is so deficient in capacity as not to

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who have regularly learned the trade, is not more than is necessary to understand the art and mystery of tanning, and is, therefore, only that degree of skill which the defendant was bound to teach, under his covenant to teach the art and mystery of tanning. In other words, we do not understand the language used as importing more than ordinary skill or information in the trade. To the other instruction it is objected, that it should have been accompanied with a qualifying proviso, that the apprentice had sufficient capacity to learn. There can be no doubt that the master was not bound to impart to the apprentice the proper degree of skill at all events, whether he had the necessary capacity or not ; but it does not necessarily follow, that the instruction should have been accompanied with any such qualification. It does not appear that there was any testimony conducing to shew that the apprentice was not endowed with ordinary capacity. In the absence of such proof, the presumption is that he had such capacity, and that is all that is requisite to acquire, in twelve years apprenticeship, ordinary skill in any common trade, such as that of a tanner. If the defendant had any such excuse for the non-performance of his covenant, it rested with him to prove it, and not with the other side to prove the absence of any such excuse.

Where a lad is apprenticed to learn a trade, and the indentures stipulate that the master shall teach him the art and mystery &c. it is not enough that he merely affords him sufficient opportunity & instruction to enable him to learn it; it is the further duty of the master, not to leave the apprentice to follow his own inclinations, but to endeavor to keep

The defendant moved for, but the court refused to give, the following instruction : "that if the jury believed from the evidence, that the defendant afforded said Wheat a sufficient opportunity, and had given him sufficient instruction to enable him to learn the art of tanning, then, as to that part of the covenant, they should find for the defendant, whether the said Wheat became a first rate workman or not." If this instruction imported nothing more, than that the defendant was bound to impart only such instruction as the apprentice was capable of receiving, it would be free from exception. But the defendant might have done all that the instruction asked for, implies that he should have done, and still have left undone an important part of his duty towards the apprentice. It was his duty, not merely to have afforded the requisite opportunity of

learning, and to give the necessary instruction, but it was his duty, furthermore, to have taken the proper measures to make the apprentice avail himself of that opportunity. He should not have been left, as the instruction imports the master had a right to leave him, to his own volition, whether he would avail himself of that opportunity or not. It is because children have not the necessary discretion for the government of their conduct,—because it would be unsafe to leave them to the exercise of their own unrestrained volition, that the law has empowered the county courts to apprentice them to persons of sufficient age and discretion, and authorized their masters to use the necessary and proper coercion to control that volition, and compel them to such habits of industry, application and sobriety, as are requisite to the acquisition of sufficient skill in the master's trade.

We do not wish to be understood, that the covenant binds the master in every event or situation, to compel an apprentice of sufficient capacity, to learn his trade. We mean only, that when sued for a failure of his duty in this particular, he should satisfy the jury that he used the necessary and proper exertions to make him learn; that is, that he has acted towards him, in the matter of coercion, as an ordinarily prudent and sensible parent would act towards his own child.

But should we be mistaken in this interpretation of the import of the instruction asked for, and the words, "had given him sufficient instruction to enable him to learn the art," do import that the requisite coercion had been used, to make the apprentice receive the full benefit of that instruction, by sufficient practice under it, still we cannot say that the court erred in refusing the instruction. It does not appear from the bill of exceptions, that any testimony had been given, conducing to shew that the master had so instructed the apprentice. In the absence of such proof, the court was clearly right in refusing the instruction, and we cannot therefore say, from the manner in which the point is presented by the record, that the court erred.

Judgment affirmed, with costs.

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him in correct habits generally, and take care that he applies himself to learn the trade.

If a bill of exceptions, to the refusal of a ct. to give instructions, does not set out some evidence to which the instructions would apply, they may be deemed irrelevant, and this court will not decide that the refusal was erroneous.

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1884.

TRESPASS
q. clau. fregit.

Yeates vs. Allin.

[Mr. Monroe for Appellant : Mr. Richardson for Appellee.]

FROM THE CIRCUIT COURT FOR ANDERSON COUNTY.

April 28.

Chief Justice ROBERTSON delivered the Opinion of the Court.

A judgment in ejectment establishes (as against the defendants,) the plaintiff's right of entry; and the execution of the *hæ. fa.* enables him to take and hold the possession: he cannot, when he so entered, be dispossessed by warrant of forcible entry.

One having a right of entry upon land, may enter (without the aid of a *hæ. fa.*) against the will of a tenant in possession, if he can do so peaceably, and without trespassing upon the person or rightful property of the tenant; and, though he may be turned out again by warrant of forcible entry and detainer—trespass *quare clausum fregit* will not lie, for he may plead *liberum tenementum*, and justify under his right of entry.

ALLIN sued Yeates, in trespass *quare clausum fregit*.—Yeates relied, for justification, on a right of entry adjudged to himself and others, (claiming as tenants in common with Allin,) in an action of ejectment, in which they had obtained judgment against Allin, for seven undivided eighths of a tract of land in his actual occupancy.

The proof is, that, after the judgment, and before a writ of *habere facias* had been issued, Yeates entered, without actual force, into one of the rooms of the house in which Allin was living, and, in opening the door of an "out house," for the purpose of putting some meat in it, he broke a wooden lock.

On this proof, the circuit judge instructed the jury, that, "although they might believe from the evidence, that the defendant had the right of entry into the premises, and that that right was confirmed by the judgment of the court; yet defendant had no right to enter the premises, without the consent of the plaintiff, unless put into possession by writ of *habere facias possessionem* on the judgment; and that, if he did enter without such authority, he was a trespasser;" and thereupon verdict and judgment were rendered against Yeates, for eighty one dollars in damages.

The law is altogether different from what the instruction assumed it to be. *Liberum tenementum* is, just as it was at common law, a good plea in bar to an action of trespass *quare clausum fregit*. To say that a person has a legal right of entry, but that he has no legal right to enter without the occupant's consent, or unless the occupant shall have surrendered the possession, or left it derelict, would be inconsistent and unmeaning. The legal right

of entry, like every other perfect legal right, is independent of the will of others; for if it be not so, it cannot be claimed or asserted as a matter of right, but must be invoked as a favor, and is, therefore, no legal right. A person having a right to enter on his own land, cannot be guilty of trespass *on the land*, or *any thing pertaining to it*, by entering, whether with or without the consent of another who has no lawful right to prevent the entry. *Tribble vs Frame &c.* 5 Litt. 187, and *Tribble vs. Frame et al.*, 7 J. J. Mar. 603.

The only innovation which, so far as this case is concerned, the statute for regulating proceedings for forcible entries and detainers, has made on the common law, is, that the occupant may be reinstated, if he shall have been dispossessed against his will. But he cannot maintain *trespass quare clausum fregit*, for an entry without his consent, by a person who, at the time, had a legal right to enter.

The judgment in ejectment established the right of entry in this case; and a *habere facias* was not necessary, except for the purpose of *compelling* a surrender, and of entitling Yeates to a *retention* of the possession, after it had been delivered to him.

There is no complaint of any trespass on the person or the property of Allin. The suit is only for an alleged trespass on the land, in which Yeates had a legal interest, and on which he had a perfect legal right to enter. In such an action, for such an entry, there can be no recovery of damages, unless Yeates transcended his right of making entry. If Yeates abused his right of entry, and trespassed on the person, or the rights, of Allin, damages might be recovered for such a trespass. But the fact that, having a right to enter, he entered *without Allin's consent*, did not make him, as the instruction erroneously supposed, a trespasser, or entitle Allin to damages.

Wherefore, the judgment of the circuit court must be reversed, and the cause remanded for a new trial.

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INDICTMENT
for obstructing
a road.

The Commonwealth vs. Cornell.

[Atto. Gen. Morehead for the Commonwealth : Messrs. Sanders and Depew for Defendant.]

FROM THE CIRCUIT COURT FOR GALLATIN COUNTY.

April 28.

Chief Justice ROBERTSON delivered the Opinion of the Court.

If a party indicted for obstructing a road, would defend himself by showing that he was authorized by the county ct. to change the course of the road, he must show that he had opened the new road in conformity to the order, before he closed the old one: it is not for the com'lth to prove that the new road is variant from the order.

CORNELL being indicted for obstructing a public road, by placing a fence across it, and attempting, on the trial, to defend his act, by proving that the county court had, by its order, given him leave to change the road, and that he had opened a new road in consequence of that order,—the circuit court instructed the jury, that it was not his duty to prove, that he had made the change as authorized by the order; but that it was the duty of the commonwealth to prove, that the new road was not as designated by the order; and, thereupon, verdict and judgment were rendered against the commonwealth.

This instruction cannot be sustained. Before the old road should be deemed to have been discontinued, and before Cornell had a right to close it, it was indispensable, that he had made the new road conformably with the authority given by the county court; and, of course he could not justify the obstruction of the old without proving, not only that he had opened road, but that he had done it in the manner prescribed by the order of the county court.

Judgment reversed, and cause remanded

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1834.

CHANCERY.

Kavanaugh against Thacker's Administrator and Distributees.

[Mr. Monroe for Appellant: no appearance for Appellee.]

FROM THE CIRCUIT COURT FOR ANDERSON COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

April 28.

KAVANAUGH bought of one of the distributees of Thacker, his interest in the slaves belonging to the estate, and filed his bill to compel distribution. The circuit court dismissed it, without prejudice.

We think the court erred. There are but two grounds upon which the court could have proceeded. First; that the suit could not have been maintained in the name of Kavanaugh; and, second, that the suit was prematurely brought, as no bond had been executed to the administrator, conditioned to refund due portions of all debts which might thereafter appear.

As to the first point:—it was useless to dismiss the bill, without prejudice, if it could never be renewed in the name of Kavanaugh. We see no reason why he may not sue in his own name, to compel distribution. He made his vendor a party defendant. All the distributees were before the court.

As to the second point:—it is true, that the statute provides, that an administrator shall not be compelled to make distribution at any time until bond and security be given to refund &c.; and if an action at law were brought by a distributee, upon the administration bond, it might be necessary to aver and prove the execution and tender of a proper refunding bond, as a precedent condition upon which the right of action at law depended. But in chancery, a more liberal rule and practice are allowed. It is competent for the chancellor to require the execution of a refunding bond before ordering the administrator to pay over to the distributee, and it would be erroneous were he not to do

The purchaser, from a distributee, of his interest in a decedent's estate, may maintain a bill, in his own name, for the share he purchased—making his vendor and the other distributees, as well as the administrator, parties.

In a suit *at law*, upon an executor's or administrator's bond, for a refusal to make distribution, it may be necessary for the plaintiff to aver and prove, that, before the suit, he tendered a bond to refund in case debts should appear: in chancery, the rule is not so strict;—there, the whole controversy may be settled, tho' no bond has been tendered, and the complainant, first being required to give the bond, may have the appropriate relief.

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1834.

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The chancellor will not in every case of a suit prematurely brought, dismiss the bill for that cause: — sometimes, where new pleadings show the cause of action to be complete at the hearing, relief will be afforded—the complainant being made to pay costs up to the time of such new pleadings.
4 Mon. 202.

it. But we can imagine no sufficient cause, growing out of the non-execution of a refunding bond, to justify the chancellor in refusing to settle the rights of the parties. These he ought to settle, and after doing so, then require the execution of the bond, in conformity with the statute, as a condition upon which the distributable shares shall be paid. Such a course was sanctioned by this court in the case of Neely's Administrator vs Neely's Heirs, 1 Litt. 294.

The case of Butler vs. Butler, 4 Litt. 202, states the rule at law to be, to decide the controversy as it stood at the commencement of the action, unless issue be taken upon a plea of *puis darreign continuance*. The same case shews that the rule in chancery is different. Where a suit in chancery is prematurely brought, although it may be no ground to refuse relief, yet it may be sufficient to charge the costs upon an over hasty complainant.

The covenant under which Kavanaugh claims, did not postpone his right to demand distribution of the slaves until his vendor's wife attained the age of twenty one years. The stipulation on that subject relates to the land exclusively.

The decree must be reversed, with costs, and the cause remanded, for proceedings not inconsistent herewith.

PEACE WAR-
RANT.

The Commonwealth vs. Cayton.

[Atto. Gen. Morehead for the Commonwealth : Messrs. Sanders and Depew for the Defendant.]

FROM THE CIRCUIT COURT FOR GALLATIN COUNTY.

April 29.

Chief Justice ROBERTSON delivered the Opinion of the Court.

A recognisance for the appearance of a party on the first day of the next ct.,

CAYTON was recognised to keep the peace, and to appear on the first day of the circuit "court" next succeeding the date of his recognisance. In consequence of the non-attendance of the judge, no court was held

at the term first succeeding the date of the recognisance. But, the judge attending at the next term, the attorney for the commonwealth made a motion, on the first day of that term, that the court would direct the sheriff to call Cayton, so that, if he should not appear, a default might be entered. The court overruled the motion, and "ordered all proceedings upon the recognisance to be dismissed." And, therefore, the commonwealth prosecutes this writ of error.

By his recognisance, rightly understood, Cayton undertook to appear in court on the first day of the first court that should be held; and, therefore, not having been exonerated by the non-attendance of the judge at the first term, it was his duty to appear on the day on which the motion was made by the attorney for the commonwealth; for that was the first day of the first court succeeding the date of his recognisance. But, if there could be any serious doubt as to the correctness of this interpretation of the condition of the recognisance, the ninth section of an act of 1798, 1 Dig. 370, should be deemed sufficient to shew that, by operation of law, the time for appearance was postponed. The recognisance was "*a matter depending in court.*"

The order dismissing "all proceedings upon the recognisance" is unmeaning, and informal. We presume, however, that the circuit judge intended by it, to declare that Cayton was exonerated from appearing then, or thereafter, in court, upon his recognisance. In that the court erred. But, as Cayton cannot be guilty of a breach of the condition by failing to appear in court at any subsequent term, and could not comply with that condition by any subsequent appearance; but has been already guilty of a breach, or not guilty, according to the facts which have occurred, there is nothing in the orders of the circuit court, the reversal of which can benefit the commonwealth.

Wherefore, the writ of error must be dismissed.

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binds him to appear at the first court actually held: a failure to hold the ct. and loss of the term, at the regular time, will not exonerate him.

A recognisance was forfeited by the failure of the principal to appear in court according to the condition; but, as the court next after the recognisance, was not held at the time fixed by law, the judge considered the cognisor exonerated, and dismissed all proceedings on the recognisance: — this was erroneous, and the order of no effect. But as the cognisor was liable for the breach, if any, and not bound to appear at any time after that—a reversal of the order would be in vain, and the writ of error is therefore dismissed.

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MOTION.

Adams' Heirs vs. Rossell and Keiser.

[Messrs. Wickliffe and Wooley for Plaintiffs: Mr. Monroe and Messrs. Sanders and Depew for Defendants.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

April 29.

Chief Justice ROBERTSON delivered the Opinion of the Court,

An equitable interest in land is not subject to execution: nor was land adversely held, until 1827.

If land be sold under ex' on, to which the defendant had only an equitable title, or some other claim not subject to the levy, the sale may be quashed upon his motion. But after his death, if his heirs attempt to quash the sale, his personal representative is a necessary party to the motion—without whom, as plaintiff, or defendant, the motion may be dismissed without prejudice.

UNDER two writs of *fieri facias* in favor of Rossell, and against Adams, the interest of the latter in a house and lot which he had bought, but for which he had obtained no conveyance, was sold by the sheriff, and bought by Keiser. Adams having died, his heirs made a motion to the circuit court, to quash the sale, because the interest held by their ancestor, was not legal, but equitable merely, and because, at the time of the sale, the house and lot were held adversely to him. But the court dismissed the motion, without prejudice, and this writ of error is brought to reverse that judgment.

The facts necessary for maintaining each of the foregoing grounds for a quashal of the sale, are satisfactorily established; and either of the grounds may be sufficient to authorize the quashal. The sale was made before the year 1827, and at a time when, according to the case of *McConnell vs. Brown*, 5 Mon. 478, the adversary possession of the house and lot rendered it illegal. And, as the process of the court had been abused or perverted by the sale under it, of that which it did not authorize the sheriff to sell, and as Adams (a party to the process,) might thereby have been subjected to danger, delay and circuity of remedy, it might have been the duty of the circuit court to quash the sale, had Adams, in his life time, made a motion for purpose.

But his heirs alone cannot maintain such a motion. His personal representative may be interested in keeping off the burthen which might be devolved on the

personal estate by a quashal of the sale, and was, therefore, a necessary party.

Wherefore, the dismissal, without prejudice, was proper, in consequence of a defect of parties, and is, therefore, affirmed.

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Faulkner
vs.
Bradley.

Faulkner vs. Bradley.

TRESPASS.

[Mess. Morehead and Brown for Plaintiff : Mr. Crittenden for Defendant.]

FROM THE CIRCUIT COURT FOR TRIGO COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

April 29.

To an action of trespass, brought by Faulkner, against the defendant, Bradley, pleaded that he had taken the horse (as a constable) in virtue of a *fiery facias* against Faulkner ; to which the latter replied, that, at the time of the levy and sale, "he was a *bona fide* house keeper, with a family, and that the horse (so taken) was [his] only work beast which was not previously levied on by execution." The circuit court sustained a demurrer to the replication, and thereupon rendered judgment in bar of the action. And the correctness of that decision is the only matter for consideration in this case.

The replication would certainly have been good had it not, in averring that the horse sold by the defendant was the plaintiff's "only work beast," added, "*which was not previously levied on by execution.*" But this addition implies the admission, that the plaintiff owned, at the time of the levy and sale, other "work beasts ;" and, admitting, as alleged, that they had been "*previously levied on by execution,*" nevertheless that levy may have been discharged without a sale, or may otherwise have not been subsisting at the date of the levy and caption by the defendant, and thus those other horses may have

only work beast
&c. of a bona
fide house keep
er, with a fami
ly, and exempt
from execution.
And in reply for
taking the pltf's
horse, defend
ant pleads that,
he, as constab
le, levied a fi.
fa. on the horse
&c.; replication
that pltf. was
a bona fide
house keeper
&c., and the
horse his only
work beast not
previously le
vied on by ex
ecution: this re
plication is bad;
for it shows that
the plaintiff had
other horses at
the time, which
may have been
his property, tho'
they had
been levied on.

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been the unincumbered property of the defendant at that time ; and, therefore, the replication may be admitted to be perfectly true, and still the necessary deduction is not that the horse taken by the defendant was, when taken, the plaintiff's "only work beast."

Wherefore, as all the averments of the replication may be true, and still not shew that the plaintiff owned only one "work beast" when the defendant levied on it, this court cannot reverse the judgment of the court below on the demurrer.

Judgment, therefore, affirmed.

SUM. & PET.

Bank of the Commonwealth vs. Curry.

[Mr. Crittenden for Plaintiff : Mr. Monroe for Defendant.]

FROM THE CIRCUIT COURT FOR HARRISON COUNTY.

April 29.

Chief Justice ROBERTSON delivered the Opinion of a majority of the Court—Judge Nicholas dissenting.

Special pleas of *non est factum* are construed with peculiar strictness: a plea of that description that does not show, by direct allegations, a state of fact wholly inconsistent with the presumption that the writing is the act and deed of the defendant—is insufficient.

Where a note is signed and delivered, with a blank left for the sum payable to be inserted, there is a presumed authority for the

To a petition and summons, brought by the President and Directors of the Bank of the Commonwealth against James R. Curry, on a note purporting to be the joint and several obligation of himself, James Finley and James Colman—he filed a long special plea, in which, after averring, in substance, that the note sued on, was signed in blank, for the purpose of renewing a prior note of the same parties, and for no other purpose, he averred that "*the said plaintiffs, combining with said Finley to defraud this defendant and said Colman, without the consent or knowledge of either of them, filled up said note, so signed in blank, as aforesaid, with the amount not only intended to be renewed, but also with the amount of [a] note executed by Finley, Timberlake, and this defendant ; thereby increasing the responsibility of said Colman and this defendant ;*" and concluding that, in consequence of the "*said fraudulent conduct,*" the note was void.

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The court having overruled a demurrer to this plea, judgment was thereupon rendered in bar of the suit.

Is the plea good? This is the only question now presented.

Whether a general plea, that the obligation was obtained by fraud, would have been good, is a question which is not necessarily presented.

The plea here is special, minute and elaborate. It purports to be a formal and precise specification of substantive facts, for the purpose of shewing not merely that vitiating fraud in the execution of the note, is the legal deduction, but that the note is not the act of the defendant. The tendency of the facts which the plea avers, is to shew that the note is not the act and deed of the defendant; and, considered as a special plea of *non est factum*, the allegations are insufficient. Peculiar strictness is applied to such pleas. The facts which they contain must *clearly* shew a state of case in which the non-execution of the deed *must* be the legal consequence of their truth.

As the plea, in this case, admits that the note was signed in blank, the legal consequence of which was an implied authority to insert *any* sum, the note must be obligatory, unless some other fact be averred clearly repelling the legal implication of authority to fill it up without restriction as to the amount. Had there been such restriction as that alleged in the plea, still the implied discretion to insert *any* sum must be conceded, unless the bank had notice of the special terms under which the note was signed. No such notice is charged. Such notice is not the necessary legal deduction from the general, common-place and incidental allegation of the plea. The imputed combination *may* imply notice by the bank, of the previously alleged facts. But such an indefinite and comprehensive allegation is only a deduction; and, in a special plea of *non est factum*, the facts from which the deduction is drawn, should be directly and specifically averred: so that the court may make the deduction from the alleged facts, and not be left to infer the necessary facts from the alleged deduction.

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holder to fill it with *any* sum—unless the amount is limited by the signer; and tho' he to whom the note is first delivered be restricted by the directions of the signer, as to the sum to be inserted, yet if the note comes to the hands of another, who, without notice of the restriction, fills the blank with a larger sum, the obligor will be bound by it.

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Wherefore, it is considered by this court, (Judge Nicholas dissenting,) that the special plea is insufficient, and that the demurrer to it was improperly overruled; and consequently, the judgment of the circuit court is reversed, and the cause remanded, with instructions to sustain the demurrer.

CHANCERY.

Smith's Heirs *against* Frost's Devisee and Others.

[Mr. Haggin and Mr. Monroe for Plaintiffs : Mr. Crittenden and Mr. Owsley for Defendants.]

FROM THE CIRCUIT COURT FOR JESSAMINE COUNTY.

April 29.

Judge UNDERWOOD delivered the Opinion of the Court, in this case, on the 5th of November last; but a petition for a rehearing having been presented, within the fifteen days allowed for that proceeding,—the final decision of the case was suspended until this day, when the petition for the rehearing was *overruled*, and the first Opinion confirmed.

1 Bibb, 375, referred to, for the titles of the parties.

The bill in the present case.

THE nature of the titles involved in the present controversy, may be seen and understood by reading the case of *Smith vs. Frost &c.*, reported in 1 *Bibb*, 375. :

Smith, who was complainant in that case, having died, his heirs filed their bill against the devisee of Frost (he being also dead,) and others, claiming all the land in the preemption of Blackford, except five hundred acres, and praying that partition might be made between them and those claiming under Frost.

The circuit court dismissed the bill, with costs. The correctness of that decision is now questioned.

By the opinion referred to in 1 *Bibb*, it was settled, that Frost was not bound to yield to the entry of Mosby, because Craig and Johnson, who were the locators;

Locators undertook to locate a pre-emption claim—of which the 500 acres in contest was part

—for half the land, and made an entry that proved invalid. They also located, for another proprietor, on the same terms, 20,000 acres, surrounding, and (the first entry being bad,) embracing the 500—though they intended to exclude it: it was held that the *locators* were bound to make good the 500 acres; and, as that might be included in their share of the 20,000, the owners of the 500 should not be required to yield to the title derived from the 20,000 acres entry. 1 *Bibb*, 375.

of that entry, were entitled to half of it, and were bound, out of their half, to make good Blackford's preemption, which they had previously engaged to locate, for the half, and upon which they had made an elder, invalid entry. That opinion clearly settles the right of Craig and Johnson to half of Mosby's entry, and gives Frost a lien upon their interest, so far as is necessary to protect him. Speaking of Frost's equity, the court say, "Smith cannot pretend ignorance of it when he received a conveyance from Mosby." In giving to Frost the benefit of the interest held by Craig and Johnson in Mosby's entry, the court deemed it necessary to declare, that they did not intend to decide, "that where one joint tenant sells a part of his joint estate, that the purchaser will, on a partition, be protected in his possession at all events; the possession of a purchaser, in such a case, especially a purchaser without notice, would deserve consideration, and ought to be protected if consistent with an equal partition; but cases might be imagined where it would be inequitable."

There can be no doubt, that, if Smith, shewing, as he did, the superior equity founded on the entry of Mosby, had admitted the right of Frost to avail himself of the protection which the interest of Craig and Johnson, as locators, afforded him; and had then shewn, that to do justice in assigning him his share of Mosby's entry, it was necessary to take a part of the land claimed and possessed by Frost, the court would have compelled Frost to surrender as much land as would secure to Smith a moiety in value of Mosby's entry. Had the case been prepared under that aspect, it would, in substance, have been nothing more than an application to the chancellor for partition between Smith, representing Mosby, and Frost, representing the locators, Craig and Johnson. Frost was entitled to half of Blackford's preemption, and for his protection, was entitled to a lien on the interest of Craig and Johnson in Mosby's entry. If, therefore, the interest of the locators amounted to as much in value as would cover the half of the preemption claimed by Frost, then it would follow

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If the proprietor of the valid entry, in such a case, (*supra*,) could not have justice done him in a division with the locators, without taking the whole, or part, of the invalid entry, (for which the locators were bound,) then he might prevail against the party holding under the invalid entry, for so much as would make up his quantity.

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But where the bill, brought by the owner of the 20,000 acres, to recover the 500, positively avers that the defendants never held more than the 500, of what the 20,000 included, it must be inferred, in the absence of proof, that the share of the locators is ample to have justice done, without touching the 500.

F purchases 500 acres, and S 300 acres, of a certain preemption—their purchases independent of each other. They both enter upon, possess and hold their respective purchases; but the entry proves invalid—their titles bad. S, however, had purchased a paramount title, that covers his own and F's land; and files his bill to reco-

that Smith could get his share of Mosby's entry without interfering with Frost. The court so decided.

The plaintiffs in error have not brought themselves within the operation of the principle in respect to partition, laid down in the opinion reported in Bibb.—There is not a particle of proof conducing to shew, that the interest of the locators in Mosby's entry is not sufficient in value to cover all the land claimed by Frost's devisee &c. in Blackford's preemption. If that be the case, Smith's heirs, claiming half of Mosby's entry by purchase from him, have no right to go into partition with Frost's devisee &c. upon the ground that they occupy the attitude of the locators, and that there is a joint estate to be divided. Under this view of the case, the plaintiffs in error have made out no ground for relief. The bill uses this language. "Of this your complainants are positive, that for more than the quantity of five hundred acres, they (meaning defendants,) have never been in possession &c." Now, if the possession of the defendants does not exceed five hundred acres, every fact in the record abundantly justifies the inference, that the locators' moiety of Mosby's twenty thousand acres entry, was more than sufficient to cover and protect Frost &c. in the enjoyment and possession of that quantity. That Frost &c. are entitled to a lien on the whole of the locators' interest, is *res adjudicata*.

But the bill and pleadings present another ground on which relief is asked. It is alleged, that the deeds to Frost &c. include more land than five hundred acres, (to which extent they were protected by the former opinion of this court,) and the plaintiffs in error, now claiming the whole of Mosby's entry, so far as it covers the preemption of Blackford, under the locators as well as under Mosby, insist that the defendants should be compelled to surrender and relinquish the surplus to them. Conceding that the plaintiffs are vested with all the equity founded on Mosby's entry, and that such equity would, if it had been asserted in proper time, have required a decree in their favor for all the land covered by the deeds of the defendants, yet no decree can now be rendered for them, because the defendants

are protected by lapse of time. Both Smith and Frost originally entered upon Blackford's preemption, as purchasers of parts thereof—Frost of five hundred acres, Smith of three hundred acres. They did not purchase jointly, or in common. The patentees of Blackford's preemption conveyed to Frost &c., in severalty, by metes and bounds, and not jointly, or in common, with the plaintiffs, or their ancestor. The defendants have held, for more than twenty years, the actual, continued possession inside of Blackford's preemption, claiming adversely to the entry of Mosby. They have had more than seven years continued possession, by actual residence, under a deed from the patentees. They are, therefore, protected against the entry of Mosby, by operation of the statutes of limitation, unless their possession has been converted into an amicable one in consequence of the litigation heretofore carried on and the decision rendered; or unless the residence and possession of George S. Smith and his heirs, within the bounds of Blackford's preemption, and likewise within the bounds of Mosby's entry, should, in equity, prevent the running of the statute, by conferring on Smith, claiming the paramount equity, the possession in fact of all the land not actually enclosed by Frost and those claiming under him.

The former litigation between the ancestors of the present parties, and the opinion of this court, did not convert the possession of Frost, under Blackford's preemption, into a friendly possession in respect to the entry of Mosby. Frost, it is true, used the circumstance, that both claims were located by Craig and Johnson, to defend himself against an asserted equity, which, without that, he could not have defeated. But making such defence did not constitute Frost the tenant, or quasi tenant, of Mosby, or Craig and Johnson. Nor did he thereby look to the perfection of his right, by procuring a relinquishment from them, or either of them, of the equitable title founded on Mosby's entry. After the termination of the suit, Frost continued to hold, as he had done before, exclusively under the preemption of Blackford. His possession was adverse, and he is

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over the 500 acres, by virtue of his later acquired title: if F, (or those claiming under him,) has had 20 years possession, or an actual residence on the land for 7 years, the statutes of limitations protect him to the extent of his claim. The doctrine, that where two occupy the same land, claiming it under different titles, the law considers that he who has the better title has the exclusive possession, does not apply.

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Where one relies upon the fact, that his possession is by actual enclosure, he must prove it—it will not be presumed.

The established principles, as to the extent to which a party acquires possession, by making an entry upon land laid down, and the authorities cited.

therefore protected by the statutes of limitation ; unless the residence and possession of Smith and his heirs within the bounds of the preemption, and entry likewise, have the effect of destroying the bar.

It does not appear, that Smith, or those claiming under him, have had any actual possession within the boundary of the deeds to the defendants. It does not appear, that there is any part of the land covered by these deeds, unenclosed. It may all have been put under fence more than seven years previous to the institution of this suit, and the possession of the defendants, therefore, may have been by the *actual* enclosure of every foot of land in controversy. If that be the case, there is no foundation for applying the doctrine laid down by the supreme court in the case of *Hunt vs. Wickliffe*, 2 *Peters*, 201. But as the proof of that fact should come from the defendants, if it existed, and there is no such proof; and as we cannot presume, that there was such actual enclosure, it is proper to enquire, whether Smith's heirs can, under the circumstances, successfully assert an equity founded on Mosby's entry. Frost and Smith both entered originally upon Blackford's preemption, claiming distinct parcels thereof. After they had thus been in possession, Smith bought an interest in the entry of Mosby. Now, the question is, did the buying of the whole or part of Mosby's entry (admitted to be valid) by Smith, give him, in equity, possession of all the land inside of the deeds to Frost &c. not actually enclosed by Frost and those claiming under him, so as to prevent the running of the statute of limitations in their favor? The solution of this question depends upon the nature of the possession of Frost &c. According to the adjudications of this court, their possession was *actual*, and extended to the limits of their deeds. The *quo animo* with which an entry is made gives the extent of possession acquired by the entry, where the tenement is vacant at the time of the entry. Thus an elder patentee, who enters on the outside of a junior conflicting patent, with a design not to interfere, does not, by the entry, extend his possession within the junior patent ; while the junior pa-

tentee, entering upon the interference, is possessed to the extent of his claim, if his intention was to take possession of the whole; provided the senior patentee had not made a previous entry upon some part of the elder patent, intending to possess the whole. In that event, the entry of the junior patentee, within the lap, only gives a possession in fact to the extent of the actual enclosure. These doctrines are conclusively settled by the following cases: *Calk vs. Lynn's Heirs*, 1 Mar. 347; *Fox vs. Hinton*, 4 Bibb, 559; *Hinton vs. Fox*, 3 Litt. Rep. 383; *Miller vs. Humphries*, 2 Mar. 448; *Bodley vs. Coghill's Heirs &c.* 3 Mar. 615. The settlement of a tenant, with a view to take possession of the whole tract, gives such possession to the landlord. *Lee vs. McDaniel*, 1 Mar. 234. There can be no doubt as to the intention of the defendants in error claiming to the extent of their deeds. A person entering on land under a deed specifying the boundaries, is in possession to the extent of those boundaries, although the person making the conveyance to him had no title. *Thomas vs. Harrow*, 4 Bibb, 563; *Bank of Kentucky vs. McWilliams*, 2 J. J. Mar. 257. The settler on land under a bond describing the metes and bounds, acquires an *actual possession* to the extent of those bounds, whether the obligor had title or not, and the subsequent entry of an adversary patentee upon another part of the land, gives no seizin to such patentee in the land so held by the settler. *Smith's Heirs vs. Lockbridge*, 3 Litt. Rep. 20.

Under the foregoing doctrines of the law, it cannot be doubted for a moment, that the defendants in error are actually possessed of the land covered by their deeds. In what way, then, are they to be deprived of the bar resulting from lapse of time, especially when their deeds vest in them the legal title, transmitted from the elder patentees? If it can be done, it is by supposing that Smith, when he purchased the entry of Mosby, became, *ipso facto*, an occupant jointly, or in common, with the defendants, or was thereby vested with an exclusive possession of all the land not actually enclosed by the defendants, or those under whom they claim. The foundation of such a position, if it has any thing

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to rest upon, is, that Smith, under the principle of the case of *Cates vs. Loftus' Heirs*, 4 Mon. 442, shall be presumed to have extended and enlarged his possession by the purchase of Mosby's entry, in such manner as to embrace all the land not actually enclosed by the defendants, or Frost in his life time ; and having, by such extension and enlargement of his possession, passed the boundary of Frost, that he held thereafter, a sort of joint or common occupancy with him, so as to allow the application of the doctrine, that where two occupy a house or land, claiming under different titles, the law considers the entire possession to be exclusively with and in him who has the better right. This court, in the case of *Hord vs. Bodley*, 5 Litt. Rep. 88, determined, that, where the junior patentee had entered and settled within the interference, and afterwards the elder patentee entered upon and improved a part of the interference, with the intention to take possession to the extent of his patent boundary, that, in contemplation of law, the elder patentee must be adjudged to be possessed of the whole tract, but might elect to be disseized for the purpose of trying the title. It should be noticed, that this doctrine was laid down in behalf of the elder patentee, who had a right of entry, and is a strong case, if it does not go too far, to shew the efficacy of the paramount legal title, in conferring actual possession, by operation of law, in behalf of the holder of such title. Suppose the case had been reversed, and the elder patentee had been in possession of the lap, by actual residence, and the junior patentee thereafter entered upon the interference, and improved a part of it : could such an entry, by the junior patentee, have ousted the elder patentee beyond the extent of the actual enclosure which the junior patentee might make? Certainly it could not. The case of *Miller vs. Humphries*, already referred to, settles the point. If an actual entry, therefore, by the junior patentee, could not oust the possession beyond the extent of the close made, how can the purchase of an equity, admitted to be paramount, but without any actual entry upon the interference, amount to an occupancy in common, so as to confer the possession in equity upon

the holder and purchaser of such paramount equity? It cannot possibly have that effect. The statute of limitations operates in favor of the possession against a paramount title outstanding, and if it will bar an outstanding legal title, much more will it bar a stale equity. The chancellor applies the bar in equity by analogy. Now, suppose the junior patentee enters and settles on the lap before the elder patentee enters on any part of his tract, and that the elder patentee thereafter enters on his tract, outside of the interference. If, in this state of case, he permits the junior patentee to hold the interference, for seven or twenty years, adversely and continually, by actual settlement, he cannot recover in an action of ejectment: could he, notwithstanding the bar to his legal right, file a bill in chancery to assert a paramount equity founded on his entry, upon the ground that the entry covered the interference, and the possession of the junior patentee, and that he had taken possession of the land covered by the entry before the statute had fully run? Could the idea of his possession under the entry alter his attitude? Certainly it could not, unless the maxim, that equity follows the law, is disregarded. If the elder patentee, in such a case, would not recover in equity against the junior patentee, without making an actual entry upon the interference before the time prescribed as a bar in the statute had fully run, how can the junior patentee recover when he has made no actual entry upon the interference, when he had no right of entry, and when seven or twenty years has fully run in behalf of the elder patentee settled upon the interference. He cannot recover in such a case, unless the statutes of limitation are disregarded, and all the cases cited are set aside.

If the plaintiffs and defendants in error were all living within, or possessed by actual enclosures of parts of the land in contest, then the case would be presented in which it would be necessary to decide how far the doctrines of the case of *Hunt vs. Wickliffe* shall be the rule in this court.

Presented as this case now is, it is too late for the plaintiffs to assert an equity founded on Mosby's entry.

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There is no ground for partition between the parties, growing out of their ownership of Blackford's preemption. The conveyances made to Frost &c. by the patentees, must stand until impeached for fraud or mistake, or some equitable circumstance not alleged in the present bill. The defendants never held jointly, or in common, with the plaintiffs. Their claims were always in severalty, and hence a bill for partition will not lie.

The decree is affirmed, with costs.

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Vance vs. Cox.

[Messrs. Morehead and Brown for Vance: Mr. Monroe for Cox.]

AN INCIDENTAL MOTION IN THIS COURT.

April 30.

Chief Justice ROBERTSON delivered the Opinion of a majority of the Court—Judge Underwood dissenting.

The amount in controversy determines the right of appeal to the Court of Appeals: where the debt, or damages laid in the declaration and writ, is not less than \$100, and the judgment is for the defendant, it may be considered as a judgment against the plaintiff, to the amount of his claim—from which he has the right to appeal.

Cox sued Vance for slander, and laid his damages at ten thousand dollars. Judgment having been rendered against him, in bar of his action and for costs, he appealed to this court.

A motion is now made to dismiss the appeal, on the ground that the amount of the judgment is insufficient to authorize an appeal, according to the provisions of the thirteenth section of the act of 1796, "establishing the court of appeals," and which is in these words:—"No appeal shall be granted from the judgment or decree of an inferior court to the court of appeals, unless such judgment or decree be final, and amounts, exclusive of costs, to thirty pounds, or relate to a franchise or freehold." 1 Dig. 381.

There is no judgment against Cox, for which an execution could be issued for more than the costs; but, as he sued for ten thousand dollars, the judgment in bar of his action may be deemed, in effect, a judgment against

him to the full extent of his claim to damages, or his cause of action—the value of which can only be estimated (now) by the amount charged in the writ and declaration ; and we are inclined to think that this is the proper construction of the thirteenth section, (*supra*.)

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The eighth section of an act of 1797, concerning justices of the peace, declared, that “all judgments given by any (such) justice or justices, when the amount thereof shall not exceed twenty five shillings shall be final ;” and that provision has been practically construed so as to allow an appeal to a party whose claim amounted to or exceeded twenty five shillings. This fact is entitled to some consideration in the interpretation of the almost simultaneous enactment for regulating appeals to this court, and which is couched in language similar in effect and in the letter to that just quoted from the act of 1797.

The *amount in controversy* determines the right to appeal to the supreme court of the United States ; and it is “*the matter in controversy*” that determines the jurisdiction of the circuit courts of this state over appeals from judgments of justices of the peace. There can be no reason for making “the amount in controversy” or the value of “the matter in controversy,” the test of a right to appeal, unless a judgment against a party, claiming a certain amount, should be deemed a judgment (to his prejudice) to the extent of his demand, or (which is virtually the same thing,) unless, as to him, or so far as he may be aggrieved, the amount claimed by him, or the amount in controversy, should be deemed to be the “amount” of the *judgment against him*, or to his prejudice.

The “amount in controversy”—“the matter in controversy”—and the “amount” of a *judgment against a plaintiff*, should, we are inclined to think, be understood as meaning, in substance and effect, the same thing.

But whatever might have been the intention of the legislature in enacting the thirteenth section of the act of 1797, or whatever may be the true interpretation of that enactment, as no principle is involved, and as this

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court has jurisdiction over all final judgments and decrees of the circuit courts, and it cannot be very material whether a case be brought here by writ of error or by appeal, the question we are now considering should be concluded by the established practice of this court.

The practice of this court, as we may infer from perhaps every volume of the reports of its decisions, has been to allow appeals from judgments or decrees whenever the amount in controversy was equal to one hundred dollars. And in the case of *The Commonwealth, for the use of Kennet vs. Fugate*, 1 Mon. 1, the point seems to have been directly, though incidentally, decided. The suit was on a sheriff's bond; judgment was rendered in bar of the action, and for costs, against the relator; and this court, in considering whether an appeal could be maintained in the name of Kennet, said that it could not unless the suit had been for his benefit, because—"upon the supposition that the suit was brought for the benefit of the commonwealth, there would be no judgment against Kennet, except for costs, from which an appeal to this court will not lie;" thus clearly saying, by inevitable implication, that, as the suit was for the benefit of Kennet, the judgment in bar of the action was a judgment for more than the costs, or, in other words, should be deemed to be a judgment against him for or to the extent of the amount in controversy, or of the damages which he claimed, and which he would be forever barred from claiming again, unless the judgment should be reversed.

Wherefore, it is the opinion of this court, (Judge Underwood dissenting,) that the appeal in this case should not be dismissed upon motion; and, therefore, the motion to dismiss is overruled.

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1884.

Vancleave &c. against Beam.

CHANCERY.

[Mr. Crittenden for Plaintiffs : Mr. C. A. Wickliffe and Mr. Chapote for Defendant.]

FROM THE CIRCUIT COURT FOR WASHINGTON COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

April 30.

BEAM filed his bill in chancery, to set aside the will of his daughter Margaret, upon the ground that she was not of sound mind. A jury was empannelled, in pursuance of the statute, to try the issue formed. The jury found against the will, and the court decreed accordingly.

The decree must be reversed for want of proper and necessary parties. Vancleave, whose wife was the principal devisee, was the only defendant. The other devisees, although their legacies were inconsiderable in amount, had an equal right to be heard in support of the will, and an opportunity should have been afforded them. The executor was likewise a necessary party, unless he had refused to act.

It is made a question, which of the parties had the right to open and conclude the argument before the jury. Regarding the issue as formed in this case, there is no doubt, under the principles recognized in *Higdon's heirs vs. Higdon's Devisees*, 6 J. J. Mar. 50, that the right to open and conclude the argument belonged to Vancleave &c. They, for the purpose of forming the issue, pleaded, that the instrument mentioned in the bill was the last will and testament of Margaret Beam, and concluded with a verification. To this plea a replication was filed, denying that the said instrument was the last will and testament of said Margaret. Under this issue, Vancleave &c. held the affirmative. The burden of proof lay on them, and they were entitled to open and conclude the argument.

To a bill filed for the purpose of setting aside a will, all the devisees are necessary parties; and so is the executor, unless he has refused to act.

A bill is filed to set aside a will, on the ground that the testator was of unsound mind: defendant pleads that the writing is the last will &c., the replication negatives the plea; this issue being referred to a jury, the right to open and conclude the argument to them, belongs to the defendant, who holds the affirmative — 'it is his will' &c.

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1834.

Hart's heirs
vs.
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It may be well doubted whether the court ought to have permitted an issue to have been formed in any other manner than it was. The obvious meaning of the statute was pursued, and it furnishes the best if not the only rule upon the subject.

The decree is reversed, with costs, and the cause remanded, with directions to set aside the verdict of the jury, and for proceedings in other respects not inconsistent with this opinion.

MOTION.

Hart's Heirs vs. Young *et al.*

[Messrs. Wickliffe and Wooley for Plaintiffs: Mr. Crittenden for Defendants.]

FROM THE CIRCUIT COURT FOR MONTGOMERY COUNTY.

May 1.

Chief Justice ROBERTSON delivered the Opinion of the Court.

Where a suit in chancery is brought, to recover land, against several defendants, who hold & defend, some under one title, some under another, unconnected with each other: if the bill is dismissed & costs decreed to the defendants, the taxation is to include as many attorney's fees—\$10 each—as there are separate and independent titles and defences.

Upon an *ex parte* proceeding—such as a motion to instruct a clerk as

THE principal question in this case is, whether, on the dismissal of a suit in chancery (for land) against several persons, each claiming and defending on a separate title, distinct from and unconnected with the title or defence of any of his co-defendants—each person, so claiming and defending, is entitled, under a general decree against the complainant for the costs of the suit, to an attorney's fee of ten dollars?

The amount of an attorney's tax fee in a suit in chancery for land, is fixed at ten dollars, by an act of 1820. 1 *Digest*, 124.

But, as that statute only prescribes the amount which shall be allowed for an attorney's fee to each person entitled thereto, we must look to the practical interpretation of the general law allowing costs, for an answer to the question, whether more than one attorney's fee can be taxed in any one suit.

When a claimant to a tract of land held or claimed adversely to him, by several persons, each claiming a

separate parcel under a title distinct from and unconnected with the parcel and title of the other, is permitted to maintain one suit against all of them, for recovering the entire tract, each person, so sued and so claiming and holding, may be, and, as to his defence and his costs, should be, deemed a sole and single party; and if the suit be dismissed as to all, or only a part of the several defendants, each one of the successful party, who held and defended a separate parcel, under a separate title, may be entitled to a separate attorney's fee. *Morgan vs. Curle*, 3 Mar. 294.

But all who hold and defend under the same title, constitute but one class of defendants, and but one party, and therefore would be entitled altogether to only one attorney's fee.

In this case, there having been about a hundred defendants in a suit in chancery for land, the court, after dismissing the bill, and decreeing costs in favor of the defendants generally, directed the clerk to tax seventeen attorney's fees, at ten dollars each—"it appearing (as the record states,) that there are seventeen original patents on the land in controversy, and that there were as many separate defences."

Admitting the fact to have been as thus stated, (and we have seen nothing which contradicts it,) the order of the court was allowable and proper. Under the general decree for costs, each defendant who claimed a separate parcel, and defended under a distinct and independent title, was entitled to a tax fee of ten dollars.

But, as the object of the motion was only to instruct the clerk as to his duty, and the motion itself was *ex parte* in its character, and depended on the record, it was not right to adjudge against Hart's heirs the costs of such a procedure.

The decree for costs is therefore reversed, and the order for taxing the attorney's fees is affirmed, without costs, or damages.

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to a taxation of costs—no costs are recoverable.

A motion was made in the ct. below, to direct the clerk to include several attorney's fees in the costs of a suit: it was so ordered, & that the other party to the suit pay the cost of this motion. In this court, the direction to the clerk is approved, but the order as to the costs of the motion, reversed—no costs or damages given here.

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1884.

CASE.

Gates vs. Blincoe et al.

[Mr. Monroe and Mr. Calhoun for Plaintiff: Messrs. Morehead and Brown for Defendants.]

FROM THE CIRCUIT COURT FOR HANCOCK COUNTY.

May 1. Chief Justice ROBERTSON delivered the Opinion of the Court:

A public nuisance may be abated by any body—a private one only by those injured by it.

To authorize the abating of a nuisance, the thing considered such must be so at the time it is abated:—that it had been a nuisance, and was likely to be so again, will not justify the proceeding.

In case of imminent danger of a nuisance, it may be prevented by an injunction.

An indictment is a proper remedy against one who has caused a common nuisance.

Where a defendant attempts to justify the act for which he is sued, by showing, that it was only the act of abating a nuisance, the jury is to decide

THE plaintiff sued the defendants, in case, for diverting the water from his mill, by cutting a ditch. They attempted to justify, on the ground that the mill dam was a nuisance, which they had a legal right to abate.

On the trial, the court instructed the jury that—"if the water occasioned [by the dam] was a nuisance, or had been a nuisance, and was like to become so again, the defendants had a right to cut a ditch, and draw off the water," and thereupon the jury found a verdict for the defendants, on which the court rendered a judgment in bar of the action.

Any person who is injured by a private nuisance may abate it; and a public nuisance may be abated by any one, even though it may not have occasioned any special damage or inconvenience to him individually. 1 Hawk. P. C.—c. 75, s. 12. Ba. Abr. title Nuisance (C.) Russell on Crimes, 303.

But whether the evidence was sufficient to prove, that the mill dam was a nuisance, and was subsisting as such when the ditch was cut—or whether, if it were a nuisance, it was public, or private merely, and, if the latter, whether the defendants, or any one of them, was prejudiced by it—are questions of fact, respecting which we shall not now express an opinion; because, according to any allowable deduction from the proof, the instruction by the court is deemed erroneous, and therefore, on that ground, were there no other, the judgment must be reversed, and the case be remanded for

another trial, when the facts may assume a different aspect.

In the opinion of this court, the instruction is erroneous in three particulars :

First. It is not strictly true, that "if the dam *had been* a nuisance, and was *like to become so again*," the defendants had a right to abate it. Unless it was a nuisance at the time when the ditch was cut, no person had a right to stop or obstruct the mill without the owner's consent. It is not now material whether the evidence tended to prove that the dam was a nuisance when the ditch was cut ; for the instruction clearly implies that, though it may not have been *then* a nuisance, the defendants had a right to abate it if it had been, and would probably again become, a nuisance ; and it is evident that, even though it may have been once a nuisance, and might again become so, it may not have been a nuisance when the ditch was cut by the defendants. A probability that a thing may become a nuisance, or, in other words, an actual and substantial annoyance, public or private, does not make a nuisance which can be lawfully abated; and therefore, Lord Hardwicke, in an anonymous case in third *Atk.* said that—"the fears of mankind, though they may be reasonable, will not create a nuisance."

In a proper case, when the danger is imminent, a nuisance may be prevented by injunction ; and for that which had been a common nuisance, an indictment would be an effectual and appropriate remedy.

A nuisance must be actually subsisting, to the injury of the public, or of some individual, before any person should be suffered to resort to a remedy so critical, perilous and extraordinary, as that of his own will and power, which necessity alone indulges, in cases of extremity or of great emergency, in which no ordinary remedy will be altogether effectual. The public peace should not be jeopardized, by permitting individuals to redress their own wrongs, when they might obtain adequate security and indemnity by a resort to any of the ordinary remedies in courts of justice."

Prima facie, a mill dam which was once a nuisance

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whether the nuisance was a public, or a private, one ; and if the latter, whether it injured the defendant, so that he might abate it. Instructions which, *disregard these distinctions*, and tell the jury that "if the dam was a nuisance, the defendant had a right to abate it," cannot be sustained.

If a party, in abating a nuisance, does more injury to another than was necessary to effect the legitimate object, he is liable to an action.

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will continue to be so as long as it exists ; but it *may not* ; and, therefore, as the dam may not in this case have been a nuisance when the ditch was cut, the instruction was erroneous.

Second. Even though the dam may have been a nuisance when the ditch was cut, the *defendants* had not, as the court instructed the jury that they had, a right, as a matter of course, to abate the nuisance ; because it may have been, in the opinion of the jury, a private nuisance only, and, if so, no person who was not injured by it had a right to abate it ; and therefore, as the jury, and not the court, had the right to decide whether the nuisance was public or private, and whether, if private, it annoyed the defendants, or *any of them*, the court erred in instructing the jury, that if they believed that the dam was a nuisance, the *defendants* had a right to abate it.

Third. If the defendants had a right to cut a ditch for abating a nuisance, their right was limited to that which was a nuisance : they had no right to draw off more water than so much as would abate the nuisance. If they transcended that limit, they did an injury to the plaintiff for which he might have an action. *Rex vs. Rippineau*, 1 *Strange*, 686, and *Russell on Crimes*, 306. The ditch may have been deeper than the end to be legitimately effected by it, required. There was no proof as to that point, and the instruction is, in that particular, unqualified, and, therefore, is erroneous ; because it imports that the defendants were justifiable, even if, in abating a nuisance, they, wantonly or recklessly, destroyed, *without necessity*, the total value of the plaintiff's mill.

Wherefore, it is considered by this court, that the judgment be reversed, and the cause remanded for a new trial.

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1884.Ross *et al.* vs Braydon.

PET. & SUM.

[Messrs. Sanders and Depew for Plaintiffs: Mr. Richardson for Defendant.]

FROM THE CIRCUIT COURT FOR FRANKLIN COUNTY.

Judge NICHOLAS delivered the Opinion of a majority of the Court—Judge Underwood dissenting.

May 3.

THE only point requiring special notice is as to the sufficiency of plea number two.

It says that the note sued on, was obtained from the defendants, by the plaintiff, by fraud, covin and misrepresentation.

It was ruled in *Sharp vs. White*, 1 J. J. Mar. 106, that a general allegation, that the covenant sued on was procured by fraud, constitutes a good plea in bar. We see no good reason for retracting that opinion. It not only accords with high authority, but is sustained by the principles and analogies of pleading.

In the fifth edition of Chitty's work on Pleading, page 570, he says, that, "a general plea that a deed was 'obtained by the plaintiff by fraud and misrepresentation,' is good, for fraud usually consists of a multiplicity of circumstances, and therefore it might be inconvenient to require them to be particularly set forth." At page 613. he says, that to a plea of release the plaintiff may reply, "that it was obtained by fraud; and it is, in general, unnecessary and injudicious to state the particulars of the fraud."

The same principle is distinctly recognised and established in Tresham's case, 9 Co. 110, a. We know of no authoritative adjudication to the contrary, since that case, and the profession must pardon us for not now innovating a rule which would require a precision and particularity not deemed necessary at that comparatively early period in the history of pleading.

The judgment must, therefore, be reversed, (Judge Underwood dissenting,) and the cause remanded, with directions to overrule the demurrer to pleas number two, five and six, and for further proceedings.

A plea, to an action upon a note, alleging in general terms, that it was obtained by fraud and misrepresentation, is good, without stating the particulars of the fraud — which had, in fact, better be omitted.

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1834.

DETINUE.

Merrill vs. Tevis.

[Mr. Crittenden for Plaintiff: Mr. Haggin for Defendant.]

FROM THE CIRCUIT COURT FOR BRACKEN COUNTY.

May 5. Chief Justice ROBERTSON delivered the Opinion of the Court.

The facts of the case.

THIS is an action of detinue for a female slave, born in 1822 or 1823, in this state, of a slave named Rose, and sold, in 1826, to the defendant, by Samuel Merrill; but claimed by Levin P. Merrill, the son of said Samuel, under the will of Levin Payne, of Maryland, who died in 1821, and who had, some time in 1819, delivered Rose to the said Samuel, (his son in law,) and, in the language of the bill of exceptions, "made him a bill of sale of her, for five years." It does not appear that the defendant, at the time of his purchase, or before, had any notice, actual or constructive, of the plaintiff's title or claim. And it appears, from the bill of exceptions, that the plaintiff was an infant until within about four years prior to the institution of this suit, in 1833, and lived with his father until after he became twenty one years of age; and that Rose was brought to this state, from Maryland, shortly after her delivery to Samuel Merrill by Levin Payne, and remained here, in said Merrill's family, until some time after the plaintiff attained twenty one years of age, when he left his father, and took her with him.

Instructions of the circuit court

Upon this state of case, the circuit court instructed the jury—first, that, if they believed that said S. Merrill had retained the possession of Rose for five years, under a contract (*act of hiring*) with Payne, for that term, and that the defendant was a *bona fide* purchaser of her child, without notice of the plaintiff's claim, the statute of frauds would protect him; second, that an adversary possession, for five years, by the defendant, since his purchase, would bar the plaintiff's action, and would, of

itself, vest the legal right to the slave in contest in the defendant.

These instructions present the only questions to be considered by this court. And we are of the opinion that neither of the instructions can be maintained.

First. The condition of the plaintiff *may* not be better than that of his testator would have been, had he lived until the expiration of the term of five years, during which Samuel Merrill held Rose, and had *then* died. As there is no proof that the alleged bill of sale was recorded in Kentucky, had Samuel Merrill held the possession of Rose for five years, in *this state*, and then sold her, the statute of frauds would have protected the purchaser against Payne, whether his contract with Merrill had been a loan, or had been a sale, or hiring for the term of five years or more. And, although Samuel Merrill had not been in the possession of Rose's child as long as five years before the sale to the defendant, nevertheless, if he had been in the possession of Rose, *under Payne*, five years or more, in Kentucky, when the defendant bought her child, the statute of frauds applied as well to the child as to the mother; because whenever a *bona fide* creditor or purchaser had a right to consider Samuel Merrill to be the owner of the mother, he had an equal right, of course, to deem him to be the owner also of her child.

If, as alleged, Samuel Merrill had a right to Rose for five years, under his bill of sale, the will of Payne vested in the plaintiff, only the reversionary interest; and, therefore, the possession by Samuel Merrill, *during the term which the bill of sale specified*, should not be deemed to have been the possession of his son (the plaintiff,) nor under his title, but should, nothing appearing to the contrary, be deemed to have been under the title of Levin Payne; and consequently, if Samuel Merrill held Rose five years, in Kentucky, under and in virtue of his contract with Payne, so that the statute of frauds would have operated on Payne's right, it would equally affect

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Merrill
vs.
Tevie.

If one lends a slave to another, which, after a term, is to revert or pass to a third party, the termor, during his possession, holds under the bailor, not under the reversioner.

If the agreement for the reversion, in such case, was not in writing, duly acknowledged and recorded; and the bailee and those claiming under him retain the possession, in this state, for five years before suit, creditors and purchasers under the bailee, without notice, will be protected by the statute of frauds. — The same principle applies to the children of the slave, born during or after the five years. But the holding by the bailee and those claiming under him, must be in this state; the statute does not apply to a possession held in another state.

One was possessed of a chat-

tel to hold for a term, after which it was to vest in another, and when the term expired, they were both living together in the same family: the actual possession may be presumed to have changed at the moment when the right of possession changed—a jury may so find, without proof of any action of the parties in reference to the possession.

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vs.
Tewis.

the plaintiff's right, because his only right, derived from Payne's will, was the reversion to which the testator was entitled after the termination of the term of five years. But the Kentucky statute of frauds cannot operate upon any possession of Rose by Samuel Merrill in Maryland. And, as the will vested the title to Rose in the plaintiff at the expiration of his father's term of five years, and as, at that time, he was an infant living with his father, the possession, which, in general, should be deemed to follow the title, might be presumed to have been in the son, the plaintiff, and not in the father, from the moment when the father's term of five years, which he claimed to have derived from Payne, had ended ; and, of course, in that event, if any portion of the term had expired before Samuel Merrill brought rose to Kentucky, he may never have been in the possession of her as long as five years in this state.

Wherefore, as the first instruction does not discriminate between a possession in this state and a possession in Maryland, or between a possession under the title of Payne and a possession under the title of the plaintiff, it must be deemed erroneous ; because, conceding every thing hypothetically assumed in it, the jury might have inferred a state of case to which the statute could not apply, and which might entitle the plaintiff to a judgment, if the whole transaction should be deemed fair and candid.

Second. As the plaintiff was an infant when his cause of action accrued, and five years had not run from the time when he attained twenty one years of age, to the institution of this suit, and as no person but the plaintiff had any cause of action at the date of the defendant's purchase, the statute of limitations cannot bar the action ; nor can the duration of the defendant's adversary possession, of itself, vest the legal right in him, so far as it is called in question in this suit.

Wherefore, the judgment of the circuit court must be reversed, and the cause remanded for a new trial.

The act of limitations, barring the right to recover a slave after an adverse holding for five years, saves the rights of infants for 5 years after they attain to full age.

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1834.

Harrod vs. Hill.

REPLEVIN.

[Mr. Todd and Mr. Herndon for Plaintiff: Messrs. Sanders and Depew for Defendant.]

FROM THE CIRCUIT COURT FOR FRANKLIN COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

May 5.

THIS is an action of replevin, in which, though the officer returned that he had, according to the command of the writ, restored the property which had been replevied, the circuit court rendered judgment *retorno habendo*, as well as for damages and costs.

The judgment *retorno* is erroneous. But, though this is admitted, the counsel for the defendant in error, having produced a supplemental record shewing a *remittitur* of "the damages" in the circuit court, and offering to enter a similar *remittitur* in this court, insists that the judgment should be affirmed.

It is not material to determine whether, as was said by the supreme court of the United States in *The Bank vs. Ashley*, 2 Peters, 327, a *remittitur* in the inferior court after error brought, should be available in this court, so as to produce an affirmance at the costs of the defendant in error. Nor need we intimate, whether this court should, or could rightfully, establish such a rule as that made by the supreme court in the case in 2nd Peters (*supra*), as to the effect of a *remittitur* in this court: because, in this case, the judgment for a return of the property has not been remitted, and no offer to remit it has been made here, or in the circuit court.

Wherefore, for the error in giving judgment (by default,) for a return of the property, the restoration of which by the officer, pursuant to his writ is proved by his official return upon it, the judgment must be reversed, and the cause remanded.

In replevin, where it appears by the officer's return, that he had restored the property replevied, it is error to render a judgment *retorno habendo*; nor will a *remittitur* of the damages, cure the error, as that is no release of the judgment for a return.

Whether the practice of the U. S. Supreme Court, as to the effect of a *remittitur* in the court below, after error bro't, should be the rule here—not determined.

Spring Term
1834.

ASSUMPSIT.

Coleman vs. Simpson.

[Mr. G. Davis for Plaintiff : Mr. Scroggin for Defendant.]

FROM THE CIRCUIT COURT FOR BOURBON COUNTY.

May 5.

Judge UNDERWOOD delivered the Opinion of the Court.

A contract to pay for work and labor, may be inferred from circumstances, without proof of any express agreement.

For work done by one, at the request of another, without any stipulation as to price, the law implies a promise by the employer to pay what the laborer deserves to have.

The plaintiff, a female, was placed, when a child, in defendant's family, and remained at hard labor, receiving but a bare support, until she was 24, when she was driven off; she then sued for pay for her services : held, that the case (the evidence more particularly recited in the text) should have been submitted to the jury—who, if they believed, from all the circumstances that def't requested the plaintiff to do the work, and that there was a promise

THIS is an action of assumpsit for work and labor. It seems that Polly Coleman, the plaintiff, was placed by her father, when a small girl, with the defendant, Simpson, at whose house she lived until she was twenty four or five years of age, when she was driven away ; that she labored, ever since she was large enough, faithfully and continually, in the defendant's service, spinning, weaving, washing, cooking, cutting wood, and even carrying wood from the forest ; that she was clothed out of the same materials as those worn by the defendant's wife ; that she slept in the same house and eat at the same table, with the defendant's family, and that her services were worth as much as those of any female employed in performing such work as she did. It appeared that the defendant and his wife ordered and directed the plaintiff in the performance of her work, as they would a slave, with some difference of manner, and that the plaintiff, although not deficient in intellect, was nevertheless very ignorant, having received little or no moral or intellectual instruction. The defendant's wife performed the same kind of work as that done by the plaintiff.

It was proved, that the defendant went to see the plaintiff, after this suit was brought. During the interview, the plaintiff appeared to be much alarmed, and told the defendant she had authorized no one to bring the suit, did not know of its existence, and had no demand against him. The defendant proved, that the plaintiff said, on his last visit to her, for the purpose of trying to settle the suit, being considerably alarmed, that she had not authorized the bringing of the suit, and did not know of its existence.

Upon the foregoing evidence, the court, on motion of the defendant, instructed the jury to find as in case of a non suit.

We think the jury might, from the evidence given by the plaintiff, have come to the conclusion, that the work and labor performed by the plaintiff was not done as a volunteer, without hope or expectation of reward beyond the food, raiment and lodging furnished the plaintiff. Where there is no positive proof of an express contract to pay for work and labor, the existence of such a contract may be inferred from circumstances; and we are of opinion, that the jury might, from the circumstances of this case, have come to the conclusion, that the defendant promised expressly to compensate the plaintiff for her services, after her arrival at full age. Where work is done at the request of another, the law will imply a promise to pay for the work whatever sum the laborer deserved to have, although no price was agreed on. Whether work is done on request, or not, is to be proved, like other facts, either positively or circumstantially. We think the facts of this case would have authorized the jury to decide, that the plaintiff labored for defendant at his request. If that should be their conclusion, the law implies a promise on the part of defendant to pay the plaintiff what she deserved to have, and the jury should have given it in damages. But if the jury shall be of opinion, that there was no express contract to pay the plaintiff the value of her services, and that the defendant did not request the plaintiff to perform the work, but that she did it of her own accord, through kindness, or with a disposition to recompense the defendant for her maintenance so long as she continued a member of his family, then they ought to find for the defendant.

We think the plaintiff's declarations, in a state of alarm, about her ignorance of the institution of the suit, and having no demand against the defendant, should not conclude her. The jury should have been left to give them such consideration as they deserved. They may have tended, in some degree, to explain the true attitude of the parties.

Judgment reversed, with costs, and cause remanded for a new trial.

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1834.

Coleman
vs.
Simpson.

on his part to pay her, should have found, for her, the value of her services, from the time she came of age. But, if they believed that the services were voluntary, or intended merely as a recompense for her support, they ought to have found for defendant. Instructions as in case of a non-suit, were erroneous.

A female plaintiff, visited by defendant, seeking to settle the controversy—denied, in a state of alarm, that she authorized, or knew of, the suit, and said she had no demand on defendant:—not ground for a non suit; the jury may take this, with the other evidence, and allow it what weight they will.

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1834.

COVENANT.

Glass vs. Read.

[Mr. C. A. Wickliffe and Mr. Chapeze for Plaintiff: no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR HARDIN COUNTY.

May 5.

Judge NICHOLAS delivered the Opinion of the Court.

In the sale and assignment of a judgment, without recourse, there is no implied warranty, that the judgment and proceedings are free of error. The purchaser runs that risk; and cannot, in case of a subsequent reversal of the judgment, recover back, or avoid the payment of, the price paid, or stipulated for it, upon the ground of a failure of consideration.

Dicta—in the sale of a note there is an implied warranty, that it is *genuine*—no forgery. But no warranty (where the assignment is without recourse) that the authority of an agent, by whom the note purports to have been executed, was good and sufficient.

THE pleadings in this case present the question, whether, where the sale and assignment of a judgment, without recourse, is the consideration of a covenant, the subsequent reversal of the judgment will be such a failure of consideration as to bar a recovery on the covenant.

No sufficient reason suggests itself, why a supposed legal demand, which is clothed in the form of an existing judgment, may not be a fair subject of barter or sale, even though the judgment be erroneous, and liable to be reversed. The hazard of reversal is an incident, the risk of which the purchaser must be presumed to incur, unless he guards himself against it, by an express covenant from the vendor. If it be a vendible thing at all, as it must be admitted to be, the validity of the sale of it can never be tested by its actual, intrinsic value merely. The chances against a reversal may well be such, in the estimation of a purchaser, as to induce him to speculate on his faith in them. It is his concern, to take care not to pay more than the chance is worth. It was held by Lord Mansfield, to be a fair subject of wager, whether a particular judgment to which a writ of error was prosecuted, would be reversed or not.—The chance of preventing the reversal of a judgment, cannot be a less fair and legitimate subject of speculation. Each party must be presumed to act on his own opinion of the law, and the manner in which it will be expounded by the appellate court, and, of course, to incur the hazard of an error in his judgment.

The sale of a reversible judgment, carries with it no implied warranty that it is irreversible, any more than the sale of a bad title to property, without warranty, whilst in adverse possession, carries with it a warranty that the title is good, or of some value. A bad title of that sort, is as utterly worthless as a reversible judgment can be ; yet we believe it never has been seriously contended, either that it was not vendible, or that the sale of it produced any implied warranty on the part of the vendor. The sale of a reversible judgment is not like the sale of a forged note. The sale of a note is accompanied with an implied warranty of its genuineness, because the vendee can never be presumed conusant of the fact, that it is a forgery. But the reversible or irreversible quality of a judgment, depends upon whether it has a proper legal foundation or not, which again depends upon what the law is, with regard to that particular case, and of this all men are presumed to be equally conusant. If the validity, or invalidity, of a note, as the obligation of the apparent obligor, depended upon the proper execution of a power by an agent, one who purchased the note with full knowledge of all the facts, and without an assignment from the vendor, would have no recourse upon the vendor because of the legal insufficiency of the power to bind the apparent obligor.

If a judgment be a vendible something, the purchase money paid for it cannot be recovered back whilst it remains in force, merely because it is reversible, for it may never be reversed; and if there be no implied warranty that it never will be reversed, neither can the purchase money be recovered back when a reversal takes place. Neither, therefore, can its subsequent reversal be relied on as a total failure of consideration, in bar of a covenant of which its sale was the consideration. There would be the same pretext for treating the subsequent death of a horse, the sale of which constituted the consideration of a covenant, as amounting to a total failure of consideration. The judgment must be reversed, with costs, and cause remanded, with directions to overrule the demurrers to the replications to defendant's plea, and for further proceedings consistent herewith.

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CHANCERY.

Gass and Bonta against Wilhite and Others---a society of Shakers.

[Mr. Owaley for Appellants : Mr. Crittenden, Mr. Haggia and Mr. Cunningham for Appellees.]

FROM THE CIRCUIT COURT FOR LINCOLN COUNTY.

May 5.

Judge NICHOLAS delivered the following Opinion of a majority of the Court—from which Judge Underwood dissented.

2d 170
114 408
114 491

2d 170
116 107
116 678

2d 170
116 107
116 678

2d 170
134 328
135 345

Suit by seceding Shakers, for a division of the property of the society, and allotment of their several shares to the seceders.

THIS is a proceeding in chancery, in behalf of Gass and Bonta, two seceding members of the religious society called Shakers, resident at Pleasant Hill, in Mercer county, for the purpose of obtaining a division of the property belonging to the society, and having their shares allotted to them, either upon the principle of equality, as two of its covenant members, or according to the amount of property each carried with him into the society.

The society's articles of association, called 'the covenant.'

The following is the substance of the covenant or articles of association of the society, signed by all its members, and which constitute the terms of the trust, upon which all its property is held :—

Preamble.

The preamble recites that it is their faith and invariable practice, that "all who come into membership, do freely and voluntarily dedicate and devote themselves and all they possess to the service of God forever ; and it being their faith, that the union and relation of the church, in one joint interest, is a situation the most acceptable to God, and productive of the greatest good of any state or situation attainable on earth," therefore covenanted and agreed together by these articles :—

Art. 1. The association formed.

First. To gather themselves together, and be constituted and formed in the order of a church.

Art. 2. Trustees constituted

Second. Creates an office of trustee, or agentship, and appoints three of the brethren thereto.

Art. 3. Property of new members to be bro't

Third. New members allowed to come in, and bring and devote to the joint interest of the church, all such

property as they justly hold &c." The joint interest of the church thus formed by the free will offerings of the members, respectively, shall be possessed and held by the whole body jointly, as their natural and religious right : that is, every individual of or belonging to the church, shall enjoy equal right and privileges in the use of all things pertaining to the church, according to their order, and as every one has need, without any difference being made on account of what any one brought in." "And it shall be the duty of all the members to support and maintain the joint interest of the church, according to their several abilities as members, for the good of the whole."

Fifth. Makes it the duty of the trustee or agentship, "to take charge of all the property dedicated, devoted and given up, as aforesaid, to the joint interest of the church, or that may thereafter be given or devoted for the benefit of the church." "The said joint interest shall be held by them, in the capacity of agents or trustees, and shall be and remain forever, inviolably under the care and oversight and at the disposal of the trustee or agentship of the church, in a continual line of succession ; that the transactions of the trustees in the use and disposal of the joint interest, shall be for the mutual benefit of the church, and in behalf of the whole body, and to no personal end or purpose whatever. But the trustees shall be at liberty, in union with the body, to make presents and bestow deeds of charity upon such as they may consider the real objects that are without." In case of a vacancy in the trusteeship, the duties to be transferred and devolve on a successor to be appointed"—so that each individual appointed to the office of trusteeship, shall be invested with the power and authority of managing and disposing of the property and interest of the church."

Seventh. "As the whole end and design of our thus uniting in church relation, is to receive and diffuse the manifold gifts of God, to the mutual comfort and happiness of each other, as brethren and sisters in the gospel, and for the relief of the poor, the widow and all claim upon the society, or its members, for property contributed, or services rendered.

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into the common stock.

Art. 5. The trustees to take and hold the property in perpetual succession—the manner and purposes of their holding—their powers and duties.

Art. 7. The members covenant to give up all their property to their church, for charitable uses &c. and relinquish

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the fatherless, and such as may be deemed real objects of charity ; therefore, we covenant and agree together, that we will never hereafter make any account of labor or property or services, devoted by us to the purposes aforesaid, or bring any charge of debtor or damage, or hold any demand whatever against the church, or community, or any member thereof, on account either of services, or of property given, rendered or consecrated to the aforesaid sacred and charitable uses."

It is clear, that, because of the 3d article, there can be no division of the effects according to what each member bro't in ; and equally clear, upon the whole covenant, that the intent is, that the whole property and labor of each member shall be devoted to 'the church,' as a quasi corporation, for 'charitable purposes,' the support of continuing members &c. forever :— and the question is, whether such a covenant is valid in law.

The third article precludes any claim to a division to be made according to what each brought in ; and the single question is, whether the complainants have such an interest in the property of the society, as entitles them to a partition and equal division with the other members. There is not, nor can there be, any dispute, that if they obtain such relief, it must be in direct contravention of their express agreement. Nothing can be plainer than the intent to keep the property together in perpetuity, for society purposes, free from any individual claims on the part of its members. The preamble sets out by declaring, "that all who come into membership do freely and voluntarily devote themselves and all they possess to the service of God forever ;" and that the union and relation of the church, in one joint interest, is a situation the most acceptable" &c. and then covenant, in the first place, "to gather themselves together, and be constituted and formed in the order of a church:" that is, into a society by the name of "a church." The principal aim, to be gathered from the preamble and this first clause of the covenant, was to build up a religious society, "devoted to the service of God," and, as a means of sustaining the society, that "all free will offerings" should be dedicated to the service of God, by being devoted to the uses of the society. The expectation was, that the society was to remain together, and, through a succession of members, continue forever. It could not answer the purposes of such a society, that the property upon which it was to depend for its subsistence, should be the joint and several estate of its members as natural persons, subject at

all times to reclamation and division. Such a right would be obviously incompatible with the great leading intention of building up and perpetuating the society, and of dedicating the property brought into it, "to the service of God forever." If this covenant, then, be construed, as all covenants must be, with an eye to the subject matter about which it was written, it seems to us, there will be little room for doubt or difficulty, as to its true construction. The third article, after providing for the admission of new members and their bringing in their property and devoting it to the "joint interest of the church," provides that the "joint interest of the church thus formed," shall be "possessed and held by the whole body jointly as their *natural* and religious right." How as their natural and religious right? The article proceeds to explain: "that is, every individual of the church shall enjoy equal rights and privileges in the use of all things pertaining to the church, according to their order, and as every one has need." In other words, every member of the church, that is, of the society, shall use, according to his need, all things pertaining to the church, that is, belonging to the society. The import of the whole section being, that the property brought in should become the property of the whole society, as a society, with a several right of use conferred on each member, as a member, and by consequence, only whilst or so long as he remained a member. This construction is further fortified by the language used in the fifth section, which directs the trustees "to take charge of all the property dedicated, devoted and given up, as aforesaid, to the joint interest of the church." No terms of more significance, or of less ambiguous import, than those of "devoted, dedicated and given up to the church," could have been used to convey the idea of an absolute divestiture of all individual interest in the property, otherwise than as members of the society. When the article proceeds to declare, that the said joint interest shall be held by the agents, as trustees, and so remain forever, in a continual line of succession; and when it

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is expressly agreed, in the seventh article, that none of them "shall ever make any account of labor or property or services, devoted by us, as aforesaid, or bring any charge of debtor or damage, or hold any demand whatever against the church, on account of services or property, rendered or consecrated to the aforesaid sacred and charitable uses," the language used in the third article is entirely cleared of all doubt or ambiguity.—The expression used, that the members were to take the use as thier *natural*, as well as religious right, is sufficiently explained, by the context of the whole instrument, to mean nothing more than that they were to have such right only as members and whilst they were members of the society. The palpable intent, to be gathered from even the most cursory consideration of the whole instrument, was, to tie up, for society purposes, the usufruct of the property, and have it transmitted in perpetual succession, as though the property had been conveyed to a corporation of perdurable existence. The true point presented for consideration, is, whether this intent squares with the rules of law, or can be effectuated without doing violence to settled principles.

The grounds upon which the right to have a partition of the property, is asserted.

The claim to partition is asserted on the ground, that the beneficial use or proprietorship of the several portions of property belonging to the society, was in such as were covenant members at the dates of their acquisition. That this beneficial use or proprietorship, they necessarily held in their individual, natural, and not their society capacity. Because, not being a corporation, they could not take the use in the latter capacity. That, all the use attempted to be created, except for their individual benefit, is void for uncertainty, and for the want of *cestui que trusts* capable of taking such use, and because such use, if allowed to operate in the manner intended, would create a perpetuity. That the covenant members, therefore, took the whole estate as *cestui que trusts*, by the legal effect of the conveyances and of the terms of the covenant ;—or, that it is theirs by way of resulting trust, as the payers of the purchase money,—so much as was intended otherwise than for

their individual benefit, being void and inoperative.— And that, being thus the joint, beneficial proprietors of the property, in their individual, natural capacities, the covenants in restraint of partition, and the assertion of a several proprietorship, are repugnant, idle, and merely void.

In the argument of this case, the attention of counsel was invited to the effect and bearing upon it, of the English statutes of mortmain, of superstitious and of charitable uses ; not that we supposed the case came within the mortmain acts, but that the ground might be thoroughly explored, and that it might be ascertained, if practicable, that it certainly did not. This society of Shakers bears so perfect a resemblance, except in the single particular of not being incorporated, to those religious houses, against alienations to which the mortmain acts were principally levelled, that we wished it to be ascertained, from research, whether that circumstance would except it from the operation of those acts. The result of the investigation has been to prove, that the mortmain acts have always been strictly construed ; that they have been confined exclusively to corporations, and that no other class of cases has ever been held to be embraced by them, as coming within the mischief they were intended to remedy. Even the statute 23 Henry VIII. ch. 10, which sets forth in its preamble, that by reason of feofments made in trust to the use of parish churches, chapels, church-wardens, guilds, fraternities, companies, or brotherhoods, erected or made of devotion, or by common consent of the people, without any corporation, to the use and intent to have obits perpetual, or any continual service of a priest, or to such like uses, intents and purposes, there groweth the same like losses, inconveniences and prejudices, as doth where lands are aliened in mortmain, and renders void all such uses ; even this statute, though passed at a time when obits and priesthood were consistent with the then established religion, was construed not to apply to alienations in trust for good and charitable uses : such as finding a preacher, maintenance of a school, relief of maimed soldiers, sustenance

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The English statutes of mortmain and of charitable and superstitious uses have ever been construed as applying to corporations exclusively. The 23 of H. VIII. c. 10, which declares, that certain feofments, made in trust, to the intent to have obits perpetual—the continual services of a priest &c. shall be void, have never, to this day, been held to invalidate trusts made for charitable & useful purposes not deemed superstitious.

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of poor people, reparation of churches, highways &c., or "other like charitable uses," but only to superstitious uses. *Porter's case*, 1 Co. R. 24. It is there said, that almost all the lands then belonging to the towns and boroughs, not incorporated, were conveyed to several inhabitants of the parish, upon trust and confidence, for such good uses, as defraying taxes, repairing highways and churches, maintaining the poor of the parish &c. &c., and it would be a thing dishonorable to the law, to make such good uses void, or to restrain men from giving lands thereto. This construction has been followed ever since, and it is too late now even to call it in question, however far it may be supposed to have departed from the original, true intention of the statute.

The use created by the covenant of the Shakers, is not such as would be held superstitious in England; nor is there any thing illegal, according to the laws of this state, in the uses to which their property is devoted. [See the views of Judge Underwood, in his *Dissent—post.*] Here, where the constitution guarantees freedom and equality to all religions, it is not competent for the legislature, or any court, to denounce a use or trust made for the benefit of any religious society, as a superstitious use

The use created by the trust for this society, would at no time since the reformation, have been deemed a superstitious use in England. For though the courts there disallowed trusts in favor of the catholic or jewish religion, as inimical to the established religion and settled policy of the government, yet trusts in favor of dissenting protestants have always been sustained and enforced. With much less reason, therefore, could it be denounced here, as a superstitious use, where we have no established religion, and where, by our constitution, all religions are viewed as equally orthodox. The recognition which religion generally has obtained from common consent and legislative enactments among us, as a valuable portion of the institutions of our society, must prevent the courts from saying that every religious use is a superstitious use, and, by consequence, must compel them, in fulfilment of the spirit of the constitution, to declare every religious use a pious use. It is neither for the legislature, nor the judiciary, in this state, to discriminate and say, what is a pious, and what a superstitious use. To do so, would necessarily infringe upon the great constitutional guarantee of a perfect freedom and equality in all religions. There is, therefore, nothing illegal in the uses or purposes for which the society intended to devote its property, as a religious community; and the only question is, whe-

ther it has been sufficiently secured, to the exclusive purposes of the society, as a religious community, freed from the claims of its seceding members.

Notwithstanding the attention of counsel had been invited to the question, whether the statute 43d of Elizabeth, of charitable uses, was in force here, it was not contended, on the argument, that it was not. Our own reflections have not led to any plausible suggestion, why it should not be considered as in force. It has never been repealed, nor is there any thing in it of so peculiar and local a character, as to exclude it from adoption, under the rule embracing all English statutes of a general character, prior to 4th James I. It is treated as in force, and has been acted on, in several of the other states.

The establishing of the fact, that it is still in force, relieves us from the necessity of investigating the very vexed question, as to the true extent of chancery power and jurisdiction over charitable uses, independent of that statute. It also relieves us from an investigation of the question, whether, according to the principles of the common law, there is here a defect or want of *cestui que trusts*, to take the use according to the apparent intent of the covenant of association; or whether the uses themselves are of too indefinite and uncertain a character to be enforced, independent of that statute. For, according to a construction of two hundred years, and which has been acted on in numberless cases, under that statute, neither of those circumstances will invalidate the trust, provided it be a charitable use. Where the objects of the charity, and the mode of its application, are pointed out, but not with sufficient distinctness or certainty to be specifically and accurately enforced, the court will, under its *cy pres* doctrine, give it effect, as near the general intent as may be; and even where there is no specific mode or object pointed out, and in some cases where the object fails or ceases to exist, the court will, in respect of the general charitable purpose, devise a mode itself for giving it effect and employing the charitable funds; supply an original

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The statute 43 Eliz. of charitable uses, is in force in this state; and consequently, tho' there were a defect or want of *cestui que trust* to take the use &c. or if the use were of a character too indefinite & uncertain to be enforced independent of the statute, the trust would not therefore be void—as the chancellor could obviate those difficulties.

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The chief enquiry, in this case, is whether the trust &c. created by the Shakers' "covenant," is for a charitable use.

want of trustees, or, if necessary, displace old, and create new ones. See a digest of the cases, and a summary of the law upon this subject, in an appendix to 4 *Wheaton*. Also, 3 *Peters*, 481, and in the case of *Moggridge v. Thackwell*, 7 *Ves.* 35.

The principal, if not the only question, for our determination, is, therefore, whether this be a charitable use, such as a court of chancery would support and enforce under the 43d of Elizabeth. For if it be, it will conclusively shew, that the court ought not to assist any one in breaking up and dividing out the charitable fund; and if it be not, it will go far to sustain the argument, which insists upon a right of partition among the founders of the fund, from the want of capacity, any where, to enforce the trust, according to the intention of its creators.

Where a conveyance is made of property to be held in trust, it is not the less for a charitable use, because the founders or contributors to the fund reserve to themselves the right of partaking of the benefits of the charity, nor because they are members of the society for whose use and benefit the property is held.

The idea of this being a charitable use, is met at the threshold, by the statement, that this trust was created for the individual benefit of the members of the society, who themselves created it, and by the assumption of the broad proposition that, that can never be a charitable use which a man creates for his own benefit. It cannot be denied, that, on becoming members, each secured to himself a maintenance during life, and so far secured or reserved a personal benefit. But it does not necessarily follow, that it is not, therefore, a charitable use. It cannot be an objection to the designation of funds or property, for charitable purposes, that the founder secures to himself, with the rest of the community, a right of partaking the benefits of the charity. If the general objects be charitable, his participation in them, on the same footing with others, cannot render them the less so. The granting of property absolutely to the society, with a reservation of the right to participate in the benefits of the whole property of the society during membership, may, or may not, be beneficial to the donor, in a pecuniary or worldly view, according to the amount donated, and the ability of the donor otherwise to provide for himself. If it be conceded, that property given by a stranger, to the use of the society, would be a charitable use, it will be impossible

to discriminate a sufficient distinction between such a gift, and that from a person, or number of persons, who give their property at the time of becoming members. If the society be really charitable in its ends and objects, it cannot be any the less so because its founders, or the most of them, are its members also. The donation is not to each other, in the nature of a community of goods among individuals, but to the society. They do not hold as individuals, but as members of the society. Their proprietorship of the usufruct continues so long only, as they continue members. When they cease to be members, they cease to be proprietors. If a masonic lodge be supposed to be a charity, it will furnish the means of a fit illustration on this subject. Suppose some of the members of a lodge, the expenses of which are defrayed at the joint cost of all the members, were, by joint contribution, to appropriate a fund, or to purchase property in the names of trustees, in trust for the use of the lodge, and the defraying its expenses forever. Or suppose the individuals composing the congregation of any particular church, in order to save themselves and those who shall succeed them the expense of an annual contribution for the support of the pastor and repairing the church, unite in creating a permanent fund or in purchasing property in the names of trustees, to be held in trust for the perpetual use and benefit of the church, in the defraying those expenses. In both of these cases, the trust would be for the easement of those who created it, and, *pro tanto*, they would reap individual benefit from it. Yet it would not be contended, that the fund so created, or the property so bought, was not devoted to a charitable use. The amount of interest thus reserved for the individual benefit of the donors, cannot constitute any difference in the principle which must be the test whether it be a charity or not.

As was justly remarked at the bar, no stress can be laid on the clause of the covenant giving the trustees power to make charitable donations to strangers, with

assent of the society, to make donations to strangers—permissive merely, and indefinite as to amount—is entitled to no influence upon the question whether the trust is for a charitable use.

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The clause in the Shaker's 'covenant' that permits the trustees, with the

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The poor &c. though not expressly provided for, are not excluded from the benefits of the charity.

The objects and purposes of the society and association called *Shakers* considered—and determination that those objects & purposes are such as must, in this state and under our constitution & laws, be deemed charitable and pious; and that the trust & use created by 'the covenant,' or articles of agreement among the members, are valid in law.—[See the views of Judge Underwood, in his dissent—*post.*]

the assent of the society, because the clause is permissive merely and not directory, and because if it were mandatory, it is so totally indefinite as to amount, that it could not be judicially enforced or carried into effect. Such a clause can weigh nothing, in determining the question, whether it be a charitable use or not.

It is again objected, that this is no provision for the poor, the maimed, or the decrepid. True it is not in an exclusive degree. But persons of that class may become members, and derive the full benefit of the institution. There is nothing in its ordinances to exclude them. They require nothing, so far as we can ascertain, but the proper religious faith.

The main purpose of the institution appears to be, to enable a number of persons, of both sexes, to live together, in celibacy, as one community, for the freer and better exercise of their peculiar religious tenets. It bears a strong, if not perfect, resemblance to the convents and nunneries of the catholic faith. If we suppose the reformation never to have taken place, and that the catholic religion had still remained as the established religion, until and after the passage of the 43d of Elizabeth, it could not be doubted, that a fund devoted to the establishment or support of a nunnery or convent, would have been held to be a charitable use, on the same principle that the erection of a church, the education of ministers, the support of a parson, and such like, are now so esteemed by the English courts. If a fund were now devoted, in this state, to the erection and support of a nunnery or convent, could we say it was a superstitious use, or that it was not a charitable use? If not, then we cannot discriminate; we are equally bound to say, that a fund devoted to the sustenance of a society of Shakers, is equally a charitable use.

So long as piety is recognised, by common assent, and by the legislature, as a valuable constituent in the character of our citizens, the general law must foster and encourage what tends to promote it. In legal estimation, it must be viewed, as what is not only estimable in itself, but as an appurtenance to the characters of individual citizens, of great value to society, for its ten-

dency to promote the general weal of the whole community. By the common assent of men in all time, it seems to be agreed, that societies or communities of individuals, having its cultivation for their principal object, are necessary, or at least proper, auxiliaries to its support and propagation. In a country like ours, where it is one of the fundamental canons of the political law, that there shall be no established religion, and that government shall not actively participate in the support or dissemination of religion of any sort, all such societies—pious institutions of all sorts, must depend upon the eleemosynary contributions of individuals. This would seem to require, that the law should esteem such contributions as in a peculiar degree charitable. Whenever the end is truly pious, donations to promote it, the law must esteem as really charitable. We need not adopt, and repeat the high encomium, passed by their own counsel, on the lives and character of this peculiar people; it is sufficient to state, that the learned counsel of the other side admitted them, in argument, to be a people of the most exemplary piety, industry and peaceableness. If such be the fruit, how can we do otherwise than deem well of the tree? how can we say that which is devoted to the growth and sustentation of the tree, is not devoted to a truly pious end?

In *De Pas vs, De Costa*, *Ambl.* 228, Lord Hardwicke recognised the devise of a fund for the establishment of a *jesuba*, for instructing people in the Jewish religion, as a charitable bequest; and though it could not be allowed to take effect in the manner intended, because it was to promote what was contrary to the established religion, yet, being a charitable bequest, it should be appropriated to legitimate objects of charity.

In *Waller vs. Childs*, *Ambl.* 524, there was a bequest for the augmentation of the charitable collections, which should thereafter be made for the benefit of poor dissenting ministers of the gospel, living in any of the counties of England; which was established as a charitable bequest, and directed to be paid over to the managers of the funds of three societies, for the support of poor

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dissenting presbyterian, independent, and baptist ministers.

So also it is said, 6 *Comyn's Dig.* 469, that a gift for the maintenance of a chaplain or priest for divine service, is a charitable use, and under the direction of chancery.

In *Baptist Association vs. Hart's Executor*, 4 *Wheaton*, 1, there was a devise to the *Baptist Association*, that for ordinary meets at Philadelphia, as a perpetual fund for the education of youths for the baptist ministry, and it was held, that the association, not being incorporated, could not take the trust as a society; that it could not be taken by the individuals composing the society; that it was a charity; that it could not be established by a court of equity, because no legal interest had vested in any trustee by the bequest, and because the bequest was too vague to be claimed by those for whom the beneficial interest was intended—the statute 43d of Elizabeth having been repealed in Virginia before testator's death; but, it is distinctly held, that, if that statute had been in force, the charity could and would have been established, and that such a legacy would be sustained in England.

In *Beatty et als. vs. Kurtz et als.* 2 *Peters*, a lot of ground in the original plan of an addition to Georgetown, had been marked, "for the Lutheran church," and for a number of years had been used by the German Lutherans of the place. This was treated as a dedication of the lot to pious uses and religious puposes, and though the German Lutherans were not incorporated, and there were no trustees to hold the property, yet it was declared to be such an appointment to charitable uses, as would always have been upheld and enforced by a court of chancery, in England, under the statute 43d of Elizabeth.

These authorities establish, beyond cavil, that a pious use is considered and treated by the law, as a charitable use, both in this country and in England. As the general, undeniable, objects of the Shaker association are pious, according to the tenets of their particular reli-

gious faith, the funds that have been devoted to the purposes of the society, must be held to be an appropriation of them to charitable uses.

This does away all necessity for enquiring more minutely into the character of the association, to ascertain whether it might not properly be classed among those of the charitable order, upon other and distinct grounds. It also obviously renders it wholly useless to go into the question, principally debated at the bar, whether the trust was void, by reason of its repugnancy to those general principles of law, which inhibit the creation of perpetuities. For when the trust is established to be a charitable use, it is no objection whatever to it, that it is a perpetuity also. The statute 43d of Elizabeth has always been held a *pro tanto* revocation of the prior statutes of mortmain; and though a corporation, according to the principles of the common law, could not be seized to a use, yet the courts have gone so far in support of charities, since the 43d of Elizabeth, as to maintain devises to corporations in trust for charitable uses.

It is also objected to the the validity of this trust, that it is a covenant in restraint of the freedom of religious faith; that the members of the society are constrained to a continuance in this particular faith, for fear of a forfeiture of their interest in the joint property.— But this idea proceeds upon a total misconstruction of the terms of the trust. As has been before shewn, the trust neither secures nor confers any interest in the property of the society, upon its members as natural persons. They partake of its benefits only by virtue of membership. The donating of property to the society is one thing; the becoming a member is another. Property may be donated without the donor becoming a member; and membership may be acquired without donation of property. It may be, that continuance in the faith is necessary to a continuance of membership; but the change of faith divests no individual interest in the property of the society, for the members hold no interest in the property, in their individual, natural capacity, to be divested. But even if the terms of trust

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The trust established by the Shakers' 'covenant,' is not void as being a perpetuity; for where a trust is for a charitable use, its being a perpetuity is no objection to it.

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did carry an individual interest in the property, determinable on a change of faith, we do not well perceive how that could be made out a trust in restraint of the freedom of religious belief. Whilst it is optional with the *cestui que trust* to accept the benefit of the trust or not, it cannot be said that he is restrained of this freedom, because, upon a change of faith, the estate or interest expires by the very terms of its limitation in the instrument creating it. No such exception could be taken to the validity of the trust in the perfectly analogous case of a conveyance from A to B, in trust for C, so long as C remains a member of a particular religious congregation, and upon his ceasing to be a member, then in trust for the benefit of the balance of the congregation. Such a trust or covenant requires the performance of nothing from him, upon his change of faith, or ceasing to be a member of the congregation; it is the mere expiration of an estate according to the terms of its limitation.

The act of 1814 (2 Dig. 1057,) which, authorizing trustees to hold the land on which associations of christians erect their houses of worship,—limits the quantity they may thus hold, to four acres—does not prohibit any religious society from acquiring & holding property in other modes, independent of the act.

It is further objected to the validity of this trust, that it is repugnant to the general policy of our law, with regard to religious societies, as indicated by the act of 1814, 2 Dig. 1057; which, in authorizing them to hold their churches and adjacent ground, through the intervention of a succession of trustees, limits the quantity so to be acquired and held, to four acres. But it will be found, on reference to the act, that it contains no language which can be construed as at all restrictive of the general capacity of religious societies to acquire and hold property in other modes than that pointed out by the act. It only restrains the application of the benefit of its own provisions, to an acquisition not exceeding four acres.

We are fully aware of the objections on the score of general policy, that might be urged to the latitudinous recognition here made, of the right of religious societies to acquire property for religious purposes. But the corrective lies not with us. Whenever society shall feel such right as an evil, or it is perceived that it is about to become an evil to the state, a legislative cor-

rective will, no doubt, be applied similar to that of the mortmain act of 9th George II.

The result is, that, considering the objects and purposes of the trust under which the property of the Shaker society is held, as legitimate and valid, and that the complainants never had any interest therein by the terms of the trust, except as members and so long as they remained members, they have no right to the partition which they claim, and, consequently, their cross bill was properly dismissed.

Decree affirmed, with costs. Judge Underwood dissenting.

JUDGE UNDERWOOD, not concurring with the Chief Justice and Judge Nicholas, in the foregoing Opinion and Decision, presented his views of the case, and reasons for dissenting, as follows :—

It is thought that the contract entered into by the parties to this suit and others, constituting the society of people denominated Shakers, and located at Pleasant Hill, in Mercer county, is the creation of a charity, within the meaning of a British statute, yet in force, passed in the forty third year of the reign of Queen Elizabeth. I am of a different opinion; and as the question is one of importance, I deem it proper to state the grounds upon which I dissent from the the conclusions to which the other members of the court have arrived.

It is necessary, in the first place, to ascertain the design and object of that statute. These are set out in the case of the *Baptist Association vs. Hart's Executors*, 4 *Wheaton*, 37, and are, moreover, manifest from the face of the statute. It appears, as well from the stat-

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Shakers seceding and withdrawing, cannot compel the society to distribute, or allow to them, any portion of the common property.

DISSENT^a by Judge Underwood—who is of opinion, that the statute 43d Elizabeth, does not embrace the 'covenant' of the Shakers, & the trust and uses thereby created; that their property is not, in fact, devoted to charitable uses, within the meaning of that statute. That if the covenant be construed as an agreement to forfeit the estate of the covenantor, upon his changing his religion, it is an

agreement without consideration; contrary to the spirit of the constitution, and void.—That the effect of the covenant, so far as relates to the property of the society, is merely to constitute a general partnership, for an unlimited time,—connected with an agreement, that the property shall be preserved and increased by the industry and care of the members, so long as they respectively live, and the share of each, upon his death, pass to the survivors. That this is a partnership from which any member may, at will, withdraw, without relinquishing his interest in the joint property; and that a member may, at any time, declare the partnership, as to himself, dissolved, and demand his due share of the joint effects: which declaration and demand, should be sanctioned and sustained by the chancellor, and decreed accordingly—without further interference, however, with the rights or interests of those who may choose to remain in the society and continue the partnership in the common property.

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ute as from the opinion of the supreme court, that benevolent persons had theretofore given lands, money &c. for the relief of aged, impotent and poor people; for maintenance of schools of learning; for repair of bridges &c. &c.; which lands &c. "have not been employed according to the charitable intent of the givers, by reason of frauds, breaches of trust and negligence, in those that should pay, deliver and employ the same;" and, therefore, the statute provides a remedy for these frauds, breaches of trust, and negligences. The Lord Chancellor empowers, in virtue of the statute, commissioners to enquire into the facts touching the donation of lands &c. for charitable purposes, and by his decrees, enforces the application of the funds according to the intention of the donor. He brings trustees to an account, and compels them to apply the funds, which, prior to the statute, they might have withheld. I admit that a colossal fabric of chancery jurisdiction and power has been reared upon this statute, but I am not for enlarging its dimensions.

Two things are necessary to constitute a charity according to the statute; first, that there should be a gift or conveyance of land or money or other thing; and, second, that the gift or conveyance should be for the purpose of accomplishing some one or more of the benevolent objects mentioned in the statute, or some object so akin to them as to be embraced by its spirit.

In regard to the gift or conveyance, it must pass the title to the thing given or conveyed, so that the donor can no longer control the estate. As long as the donor keeps the control and the possession, he could apply the estate according to his benevolent designs. It would be absurd to suppose, that the statute was passed to afford a remedy, to enforce a charity, against the donor himself. It was "frauds, breaches of trust and negligence" in those who received the funds from the donor, that produced the statute. The donation must have taken effect, so far as to vest the title in a trustee, before there can be any pretence to say, that the donor has established, or created a charity. The statute does not say, that a promise to give land or money for char-

able objects, shall be enforced against the promisor. It provides only for applying a donation actually made, according to the express intent of the donor, if the specified object be legal ; and if not, then arbitrary construction and the chancellor's power have seized the fund, and applied it to such purposes as the chancellor deemed proper, rather than let it go, where the donor was dead, to the heir at law or next of kin.

In regard to the object of the gift, it must be one of those enumerated in the statute, or so nearly allied as to be embraced by the spirit of the act. Thus the erection of a mill and the conveyance of it to trustees, to the intent that the inhabitants might have the convenience of grinding there, is not a charity within the statute. 2 Vern. 387. *Ba. Abr. Charitable Uses, let. C.*

Testing the covenant of the Shakers by the foregoing rules, it is not a charity, according to my understanding, within the meaning of the 43d of Elizabeth. The funds of the Shakers are not given for any one of the objects mentioned in the statute, nor for any kindred object. If the funds are consecrated to the promotion of any charity contemplated by the statute, it is that (as it may be inferred from the opinion delivered,) which relates to the relief and maintenance of aged, impotent and poor people ; "for" (says the opinion,) "persons of that class may become members, and derive the full benefit of the institution. There is nothing in its ordinances to exclude them." True, such *may become members*. I find no ordinance to exclude them ; but I find nothing which imperatively requires their admission. The covenant does not point out the mode of admission, nor does it provide for the organization of any tribunal to decide on the application for membership. It is clear to my mind, that the covenant does not allow *all* aged, impotent and poor people, who may choose, to quarter on the estates of the Shakers, and to claim the benefit of membership, as of the "church relation ;" nor can I find a license for any *one* poor man to do this. It is, therefore, optional with the managers or trustees of the society, whether they will appropriate any part of the funds in their hands for the relief of

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the poor. Now, the very idea of a charity founded on the 43d of Elizabeth, is, that it is compulsive, and not optional, on the part of the trustees ; and the ground for interference by the chancellor is, to compel a delinquent trustee to execute the trust.

There is nothing to shew, that the members of the "church relation" are objects of charity, or that they stand in need of donations, for their maintenance as poor people. The contrary is fairly deducible from the covenant. According to the third article of the covenant, no one can become a member, unless he be of lawful age. Those who are free from debt are allowed to "bring in, and devote, as a part of the joint interest of the church, all such property as they justly hold." Whether insolvency would be a valid objection to a candidate for membership, is left for inference ; but conceding that it is no objection, and that a person may become a member without contributing any property to the joint funds or estates, as soon as he unites himself to the society, it is a part of his covenant duty "to support and maintain the joint interest of the church according to his ability." His labors, thereafter, are to be devoted to the increase of the property of the society. Such a member, who is capable of earning a support, is no object of charity, within the meaning of the statute. It does not appear that any one of the covenant members now is, or was, at the time of signing the covenant, incapable of supporting himself by his labor. According to the third article, "the joint interest of the church, formed and established by the free will offerings of the members, shall be held and possessed by the whole body, jointly, as their natural and religious right ; that is, all and every individual of, or belonging to, the church, shall enjoy equal rights and privileges in the use of all things pertaining to the church, according to their order, and as every one has need, without any difference being made on account of what any one brought in." The evidence shews that the estates held by the society are large and valuable. Here, then, we see an association of individuals of full age, capable of supporting themselves by their own labor, bringing to-

gether their separate property, and throwing it into a joint stock, constituting a rich fund, held by the whole body jointly, and to be used by them as they severally stand in need, and bound to increase and keep up the fund by their labors ; and this association is made the establishment of a charity for the benefit of *poor* people! I cannot perceive, in the 43d of Elizabeth, any foundation for such a conclusion.

The estates of the Shakers are held exclusively for the use of the covenant members. The trustees are not bound to appropriate a dollar to feed or clothe any one, unless he be a covenant member, with the exception herein after mentioned. There is a stipulation in the fifth article to this effect:—"The trustees, in union with the body, *may* make presents and bestow deeds of charity upon such as they consider real objects, that are without." This provision is not imperative. Its insertion, shewing that deeds of charity towards others, were in the contemplation of the parties, indicates strongly to my mind, that they did not regard themselves as objects of charity in consequence of their poverty. This consideration, taken in connection with the wealth which the society is shewn to possess, effectually discountenances the idea that the object of the Shaker covenant was to create a charity for the benefit of *poor people*, within the purview of the statute of the 43d of Elizabeth.

The exception alluded to, is in the case of a person who joins what is called the "family relation." A schedule is taken of the goods and chattels of the person so joining, and if he chooses to withdraw thereafter, the society pay him in kind the value of the property mentioned in the schedule. The person thus joining a family of Shakers is entitled to a support during his continuance in the family, and is bound to contribute his labor, and the use of the property mentioned in the schedule.

I cannot perceive any object which can sustain the covenant of the Shakers as a charity under the 43d of Elizabeth, (and no other has been suggested,) unless it be that of providing for the destitute and helpless.—

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No such object is avowed ; their estates are consecrated to no such purpose ; on the contrary, they are expressly held for the use of the covenant members, as they severally have need, notwithstanding they may be every way capable of supporting themselves, and not dependant on the charitable fund. If I am correct in this view of the subject, there is no charity created for want of such an object as the statute sanctions. It should be remembered, that the covenant does not give funds or estates for charitable objects without specification.— Were such its operation, it might be contended that the chancellor might lay hold of the funds, and apply it to a particular object of charity of his own designation. The covenant appropriates the property to specified purposes ; and the question is, whether these purposes are embraced by the statute ? If they are, I see nothing to prevent two or more men from consecrating their property and the earnings of their industry, by an association similar to that of the Shakers, leaving out its religious and antinuptial character, to the support of themselves, their wives and their children and their children's children, through all time to come, exempt from the claims of creditors. The religion which mingles in the covenant of the Shakers can give it no additional weight as a charity. If it can, the heads of families, associating as I have supposed, might bring their peculiar religious tenets into their articles of association. Our judicial tribunals cannot take cognisance of a man's religion, and determine who possesses the most orthodox creed. The faith of A is just as good a consideration in law as the faith of B, and no better. A covenant to provide, by such an association as is supposed, for women and children, would at least present as strong claims to the consideration of a chancellor, for enforcement as a charity, as the covenant of the Shakers in the present case. I do not know the terms upon which the Harmonists and Mormonites associate ; but I see no reason why their associations may not be charities under the 43d of Elizabeth, if the association of the Shakers be a charity under that statute.

I not only think that the covenant in question creates no charity, because of the absence of a legitimate object, such as the statute tolerates; but I am of opinion that there is no gift, no donation, no divestiture of title, and placing it in trustees, for any charitable purpose whatever. The third article of the covenant, already quoted, after stating how the joint interest of the church is to be formed, expressly declares, that the property "shall be held and possessed by the *whole body jointly*, as their natural and religious right." The addition of the words "*natural and religious right*" do not give greater force to the previous part of the sentence. It means that the members of the church or society of Shakers shall hold, as joint tenants, all the property and funds contributed by them severally. Although they have not expressed it in terms, yet I think it may be collected from the whole covenant, that they likewise intended to abide by the repealed doctrine of the *jus accrescendi*; and when a member died, it was probably the design of the covenant, that his interest should pass to the survivors. There is no provision expressly cutting off heirs and distributees.

The fifth article of the covenant makes it the duty of the trustees to take charge of the property and estate dedicated and given up, "to the *joint interest* of the church;" and provides that it shall be "at the disposal of the trustee and agentship of the church in a continual line of succession." Now I think it is clear, that the third article vests the title of the property in the whole of the members jointly. The fifth article does not divest the members of their title, but merely authorizes the trustees or agents appointed by the second article, to bargain and sell, and dispose of the property, given up "*to the joint interest of the church*," (that is, vested in all the members,) "for the mutual benefit of the church, and in behalf of the whole body." In this view, the trustees or agents of the society are not vested with the legal title, but a power merely is conferred upon them, under which they may lawfully sell any part of the property. It became necessary for such a body,

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in consequence of their numbers, regarding the objects of their association, to transact the business of selling and buying through the instrumentality of a few agents. The fifth article, while it confers the authority to sell, does not vest the title. The title is vested in the whole body, by the third article.

The sixth article contemplates future acquisitions, and provides that all deeds &c. "which may hereafter be given to the trustees or agents of the society, for and in behalf of the joint body or church, express reference shall be had to the covenant." I do not consider it very important to enquire into the proper mode of drafting a deed or conveyance, under the sixth article, so as to secure to the "joint body or church" the full benefit of the estate purchased. For, if it be conceded that the legal title would abide in the trustees, there can be no question that the deed should be so drawn as to secure the use of the estate to all the members of the society, in conformity with the provisions of the covenant. The requirement to make express reference to the covenant, was intended to secure this object. It should, at least, be such a deed, as under the twelfth section of the act of 1796 concerning conveyances, would transfer the possession to those entitled to the use. Now, an estate so held, is for many purposes a legal estate. So far as it relates to the enjoyment of such an estate, it is as valuable (and as vendible too,) as a legal estate can be. Whether, therefore, the whole of the estates have been purchased under the sixth, or made up by contributions, (so far as relates to the personalty at least) according to the third article, can make no difference. Be it the one way, or the other, I contend that there is no gift or donation for charitable purposes within the meaning of the 43d of Elizabeth.

The gifts contemplated by that statute, are such only as are placed, when made, beyond the control of the donor. Now, every article of the Shaker covenant shews, that the joint estates of the members continue subject to their control, notwithstanding the supposed donation for charitable purposes. The members appoint agents to manage, to sell, to buy. If these agents

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vacate their appointments by death, or otherwise, the members of the society have an unquestionable right to appoint others in their place. These agents are responsible to the members for their conduct; and by the sixth article, are bound to keep books, in which the public affairs of the society are to be registered. Every member has a right to inspect these books, so that he may be informed of the conduct of the agents.—The agents, in union with the body, (that is, provided a majority of the members consent,) may make presents &c. Here is a positive stipulation, which allows the agents of the society, acting in union with its members, to give away every cent's worth of property owned by the whole jointly. What would become of the charity established for the benefit of the Shakers, in case they should think proper to give away all their funds to needy christians of other denominations, or to infidels? Would they, as trustees of the fund, thereby be guilty of such fraud as would allow the chancellor to interpose and arrest them, for doing a thing which is expressly provided for? But suppose, instead of giving away the property, the members of the society should cease those industrious, economical habits, for which, greatly to their praise, they are celebrated, and should consume the whole, under that provision of the covenant, which authorizes them to use it as they severally need—has the chancellor a right to interpose and arrest them, upon the ground that they are devastating the funds of a charity?

Suppose further, that the members of the society were unanimously to agree to terminate their covenant, and to divide out the estates in severalty—has the chancellor any power to prevent their doing it? If the covenant has created a charity under the 43d of Elizabeth, and the members of the Shaker society are the recipients merely of its benefits, the chancellor would and ought to interfere. But if the covenant has retained to the members absolute dominion over the property of the society, then the members are not amenable to the chancellor, and they may destroy the foundation of the

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whole superstructure, if they please. I cannot bring my mind to doubt, as to the power of the members, to abolish or to amend their covenant and dispose of their estates and funds as they please. They have made no stipulation that they will not. The whole is the creation of their volition as free agents. They have never passed their property out of their own hands. They have provided expressly for the control of it in several important particulars, by limiting the power of their agents; and by securing the accountability and appointment of trustees and agents, they have effectually reserved power in their own hands to direct and control the entire disposition of the whole. There is no law abridging their right to change or modify their contract, and so long as their capabilities to make a contract remain, they can annul or remodel a contract already made. If the Shakers have ever made a gift for a charity, to whom was the gift made? To themselves, is the only answer which can be given. I deny that a man can give his estate to himself, and consecrate it thereby as a charity. He cannot contract with himself. I deny that he can establish a charity by conveying his estate to a trustee, with a covenant in the deed that the trustee shall hold for the use of the grantor. This is the case of an individual. An association of individuals cannot, by their union, alter the rules applicable to their conduct, and give a different aspect to a joint act, from that in which it would be viewed were it the performance of a single individual.

The opinion delivered, not only regards the property carried into the joint stock as consecrated to the charity, but it takes in all the earnings of the members during their membership. If this may be done, why not pursue the earnings of a seceder, because he has once been a member, and appropriate these likewise to charitable purposes, under the idea that there is an entire devotion of all that a member has at the time he signs the covenant, or which he may thereafter obtain, to the objects of the society? The covenant expressly "requires a devotion to this extent."

It is said in the opinion delivered, that "it cannot be an objection to the designation of funds or property for charitable purposes, that the founder secures to himself, with the rest of the community, a right of partaking the benefits of the charity." I admit, that the participation of the founder in the benefits of a public charity, is no argument to prove the efficacy or invalidity of a charitable donation in many cases. Thus, if I give money to a trustee, to build a church, for the use of presbyterians, baptists, or methodists, it is no objection to the charity that I myself as a member of the society for which it may be built, occupy a seat and attend public worship in it. So likewise if I give money to build or repair a bridge, it is no objection to the charity that I myself pass over it, in common with the rest of the community. But if I give money to a trustee, to lay it out in the purchase of estates for the use of myself, wife and children, as we "severally need" during life, and then to "remain forever inviolably under the care and oversight" of trustees, for the use of my lineal descendants, as generation may succeed generation, to the end of time, I deny that it would be a parallel case to the donation of money to build a church, or a bridge, or to accomplish any other charitable object, within the meaning of the 43d of Elizabeth. No name which I might give the transaction by which I would thus entail estates upon myself and descendants, could constitute it a charity; and yet, this case, in principle, is precisely the case of the Shakers, with this difference, that by my arrangement, I have excluded all persons from participating in the use of the estates, unless they come in by a rule of blood, which I require shall be observed; and in their case, they have excluded all who do not come, in virtue of a peculiar religious faith. Both cases, however, agree in this, that it is an appropriation of money essentially not public, but private and selfish, where a provision for one's self during life, (and that is as long as we can enjoy property,) is the first object which strikes the attention. I hold such an object utterly incompatible with the charity recognised by the

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statute. Truly, charity begins at home, if such things are charities.

If the covenant does not create a charity under the 43d of Elizabeth, what does it accomplish? I think its scope and design perfectly manifest. The preamble to the covenant explains their object, and furnishes the rule by which the covenant itself is to be construed. It appears from the preamble, that the signers of the covenant believe, that the gathering together of the disciples of Jesus Christ, about the day of Pentecost, and holding property jointly or in common, "was only to serve as an example or shadow of the everlasting union of the saints, when Christ should appear the second time;" that Christ has actually appeared the second time in the world, of which fact, there is a new testimony or revelation from God, first made in England, and thence "transplanted" to America; that "when the work of God began, in these last days, it evidenced itself to be the very work which God had promised; in gathering souls together and uniting them together in one interest, in things both temporal and spiritual;" that it is "their duty and privilege, according to the holy scriptures and the present call of God, and the civil and religious rights secured to them, to obey their faith in all things; and moreover, it being their faith, that the union and relation of the church of God in one joint interest, is a situation the most acceptable to God and productive of the greatest good of any state or situation attainable on earth," they, therefore, agree "to unite in one body as a religious community, to be constituted, built up, and established upon the principles and rules of the church of Christ aforesaid;" that, in the language of the preamble, "as God, according to his promise, has begun to give his people one heart and one way, that they may serve him forever, we do therefore expressly agree to and with each other, that the order of God may be known in the church, we will observe and keep, as delivered to us, with all and singular the rules, manners and customs of the church, in relation to union, communion and fellowship, the rights, duties and privileges of the members, as also the offi-

cers of trust and care in the disposal and management of the joint interest of the church, according to the following articles of covenant." Then follow the seven articles of the covenant. It appears from the preamble, that the marriage relation is believed to be inconsistent with God's will, and a mode is pointed out for dissolving the tie, which binds husband and wife, in conformity with their ideas of religious duty. It also appears from the preamble, that there are two orders in the society of Shakers; first, the family order or relation,—the consequences resulting from which have already been briefly stated; and second, the church relation or order. Those who sign the covenant thereby become members of the *church relation*. Those who enter the church are required to "settle it in their hearts, to make a full sacrifice to God, once for all: as no ground is, or ever can be, left for any recantation." The members of the church are to "dedicate and devote themselves and all they possess to the service of God forever, according to the faith and invariable practice of the church."

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The foregoing is a brief outline of the creed; the articles of the covenant are its fruit. The following will give an idea how the spiritual and temporal affairs of the society are in fact conducted. I shall not stop to enquire, whether in strict conformity with the articles of covenant or not. The preamble shews, that the "present testimony of Christ's second appearing," was received "through the medium and ministration of the general church in the eastern states, whose centre of union is the particular church of New Lebanon, in the township of Lebanon, county of Columbia, and state of New York; from which place, the messengers of gospel were sent." The depositions prove, that, in the government of the society, the ministry are first and highest in power and authority—their appointment is by the mother church at New Lebanon, and vacancies are filled from the same source. Four persons constitute a full ministry, two of each sex—a less number can act. The ministry appoint the elders, and the ministry and elders appoint the deacons and trustees. "The

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officers of the society, within their respective jurisdictions, are the sole judges of disorderly, disobedient and refractory conduct, and of departures from the established rules and usages of the society ; and are authorized to apply such correction as in their judgment will effect the reformation of the offender, subject to the restrictions of the covenant." This is an extract from a deposition, and not from any part of the covenant.

The question recurs, what results from the creed, the covenant and the official machinery ? Nothing to my mind, but a general partnership for an unlimited time. The members, believing their duty towards God requires them to break up those relations of life which they deem carnal, and to live together as brothers and sisters in Christ, for their spiritual edification, have thrown all their property into joint stock, in which each is to have the same interest with every other, and they are, by their industry, to preserve and increase the fund and enjoy it so long as they live, and then it is to pass to the survivors, being members of the society, without ever terminating the institution. That, in my opinion, is the essence of the whole scheme. So long as its members choose to abide by it, I have no doubt it is competent for them to do so. But the opinion delivered puts it out of the power of the whole, or any one member, to bring about a partition of the joint estates, by declaring that these estates are consecrated to charitable purposes ; and the opinion only gives a use to a member as long as he continues in the society, and of course terminates the use in respect to any one member, just as soon as he voluntarily abandons, or is expelled from the society.

I cannot consent that a voluntary abandonment, or expulsion from the society, terminates the interest of a member in the joint estate. There is no express provision in the covenant which imposes a forfeiture in case of abandonment or expulsion. If such a consequence can be collected from the covenant, it must be found in the stipulations of the seventh article, by which all the members agree never to " bring any charge of debt, or damage, or hold any demand, whether against the

church or community, or any member thereof, on account of either property or services given, rendered or consecrated to the aforesaid sacred and charitable uses." The provision is not limited in its operation to those who leave the society. Taken literally it embraces those who continue in it, as well as those who depart. It cannot possibly be construed to mean, that those who remain members shall hold no demand against or upon the property of the society, which, by the third article of the covenant, is expressly charged with their support. Such a construction would be altogether repugnant to and inconsistent with the plain and obvious temporal design of the institution. If any meaning can be given to it at all, it must be made to operate exclusively upon those who voluntarily or by expulsion leave the society. I think it cannot deprive such of their interest.

Those who entered into the church relation, did so, no doubt, under a full conviction of duty, and after coming to the conclusion, "once for all, to dedicate and devote themselves and all they possessed to the service of God forever," according to their peculiar faith. It was absolutely necessary to provide for the support and comfort of the body while they were serving God spiritually. The formation of a joint stock, or interest, was adopted as the best plan to provide for the body, and to place all the members in a situation best calculated to enjoy their religion. I cannot suppose that any one hypocritically became a member of the church relation, merely for the purpose of acquiring an interest in the joint estates and funds, and with a premeditated intention thereafter to abandon the society, and seek for a partition. Admitting all to be sincerely devoted to their religious creed, they signed the covenant under the belief, that they would never renounce the faith professed, and that they would continue of choice, through life, to act up to its precepts. Under such convictions, they brought their property into the partnership; or, what is the same thing, into the society. But an individual member changes his faith; new views and opinions are embraced, and he now believes, that it is as inconsistent

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with the will of God to continue in the society, as he formerly thought it was his duty. Under such a change, he abandons the society, and claims a share of the property. I think it ought to be decreed to him; because, as to him, all the purposes for which the partnership was entered into have ceased; and because, it was entered into for an indefinite period. His change of religion has as effectually disqualified him from performing the things, and submitting to the rules imposed by the Shaker faith, as the infliction of lunacy would disqualify a member of an ordinary mercantile copartnership, from performing the duties imposed by the partnership contract. The chancellor should, therefore, put an end to both descriptions of partnership, under such circumstances, by dissolving them, as far as they related to the interests of the disqualified member, leaving the rights of others untouched, and at liberty to proceed in their social capacity, if they choose to do so. Indeed, where general partnerships are formed for an unlimited time, any member, at his mere pleasure, may withdraw, and claim his share of the partnership effects. *Watson*, 379-80. The society of Shakers is nothing but a partnership, embracing the business of the lives of its members. The tie which binds them together, is their religious faith or belief, and I will briefly enquire into the effect which a change of faith or belief can, or ought, to have upon the temporal interests or property of its members.

It must be borne in mind, that the property of the Shakers is the production of their own industry and accumulations. If I give an estate to support and educate Shaker youths, or presbyterians, baptists, or methodists, I readily admit, that the recipients of my bounty, cannot, by any agreement among themselves, or by any thing they can do, place themselves in a condition in which they could demand a partition of the estates and funds proceeding from me. That is a very different case from one where the estates and funds are the product of the labor of the associates, and which the chancellor is called on to divide among them. This last is the case of the Shakers. The question is, whether a

man, in their case, forfeits all interest, if he changes his opinions and faith, and leaves the society.

If such be the design of the covenant in regard to seceding members, it ought not to be enforced; because it is, to that extent, without consideration, and in violation of the policy and spirit of constitutional principles. Admit, for the argument, that each member has agreed to forfeit his interest in the property, as soon as he forsakes the faith and the society—what consideration passes to him for that stipulation? There is no consideration of blood, nor is there any of money or property. To put a case, suppose the member of a presbyterian church, enraptured with the doctrines of his spiritual teacher and pastor, were to execute a bond binding himself to convey all his property to the pastor, if he ever thereafter disbelieved the doctrine, or renounced his membership—could this contract be enforced upon the happening of the events which were to deprive the obligor of his estate? Certainly not. Is the seceding shaker in a worse condition than the presbyterian? The only way in which the conclusions resulting from the bare statement of the case can be avoided, is, to take a distinction between the case of an executory, and an executed contract. Let us test the case, then, by putting it in another form: suppose the member of a presbyterian church conveys, by deed, all his property to A B, in trust, for the use of himself and family, so long as he continues to believe the presbyterian creed, and remains a member of the church of which A B is pastor—what will become of the estate if the grantor abandons creed and church? I do think that A B cannot thereby convert it into his individual estate, discharged of the interest of *cestui que trusts*. He held the legal title, I admit; but the trust, the use, was executed in behalf of the grantor and his family, and their use cannot be divested in favor of a mere holder of the legal title, who has paid nothing. If the use is executed at all by the conveyance, it can no more be divested by the idle stipulations relative to belief in a creed and continuance of church membership, than if it had been an executory

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contract, dependent for its fulfilment upon such considerations and no other. I know, if an estate be conveyed upon a condition which is impossible, or *malum in se*, the estate is absolute, and the condition void. But the seceding shakers have made no such conveyance, and if there be estates held in trust for their use, and that use ever took effect, I am unwilling to forfeit their right of property or the use of it, upon the idea, that they have agreed to the forfeiture, in case they changed their religion.

A man cannot prevent the change of his opinions. It is impossible to resist conviction and change of opinion, when new facts and new reasons are presented in such a manner as to give a new direction to the mind. Our own reflections may convince and turn us beyond the power of resistance. We may turn from the truth and embrace error; but turn we must, when the mind is placed under the influence of new facts, new arguments, new circumstances and relations, altogether adverse to preconceived notions. We may regret the change of our opinions; the change may give us pain; but we can no more resist the change by an effort of the will, than we can, by a similar effort, prevent the decay and dissolution of the body. An agreement, therefore, never to change an opinion, or to adhere, through all time, to this or that creed, is an idle undertaking to perform an impossibility. If the person so engaging should, in truth, perform and keep his promise, he could not do it in consequence of any obligation imposed by the covenant; but he would keep the covenant only because new lights, no matter whether true or false, did not spring up to change the direction of his mental vision, and sufficiently powerful to consume and supplant former ideas.

No man can sell his liberty and become a slave; nor can any one sell his liberty of conscience, and make his temporal rights depend upon a creed and its observances. There are inalienable rights recognized by our constitution, and liberty of conscience is one of them. "No human authority ought in any case whatever to control, or interfere with, the rights of conscience."

Now if the Shaker is convinced that his faith and worship are erroneous, and therefore renounces both, and abandons the church, is there any human authority to prevent it? None. What is the effect of an agreement, that if a man changes his creed and abandons his church, he shall forfeit his property, acquired by years of toil, and give up the means of his subsistence? Its direct tendency is, to bind down the conscience, and to suppress the "free communication of thoughts and opinions," tolerated by the constitution, as "one of the invaluable rights of man." Who will speak out, when the publication of his opinions will cause him to be cast upon the world in a state of pauperism? I am therefore of opinion, that so much of the covenant in question, as contemplates appropriating the property contributed to the joint stock by a seceder, and the proceeds of the labor of a seceding member of the Shaker society, to the use of those who remain, is not only without any consideration, but that it is a restraint upon the rights of conscience, and in violation of the spirit and policy of the constitution, and therefore ought not to be allowed.

In coming to the conclusions expressed, I do not pretend to say, that the faith of the Shakers and their religion are erroneous. As a judge, I have nothing to do with creeds or their orthodoxy. I only intend to declare my opinion, that no man's right to the enjoyment of property owned by him, and earned by his own labor, can be taken from him, in virtue of a contract which makes his adherence to this or that religious creed and practice a condition which, if violated, shall forfeit his right.

It is not necessary to state my views relative to the proper mode of making partition, because, under the opinion delivered, no partition can ever take place.

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[Mr. G. Davis for Plaintiff: Mr. Hanson and others for Defendant.]

FROM THE CIRCUIT COURT FOR BOURBON COUNTY.

May 6.

Chief Justice ROBERTSON delivered the Opinion of the Court.

The questions decided.

Two questions are presented in this case:—

First. Can a landlord distrain, for rent due by his tenant, goods in the tenant's possession, but which are under a *bona fide* mortgage to another person?

Second. Can a mortgagee of a chattel maintain trover for a conversion of it by a stranger, whilst it was in the possession of the mortgagor?

A tenant may sell his goods and chattels during his term, by sale absolute, or by mortgage; and they will not thereafter be liable to the landlord's distress, altho' they remain upon the demised premises.

First. A *bona fide* mortgagee is, both before and after forfeiture, deemed a purchaser. A tenant may, during his term, sell his goods and chattels, and the purchaser may hold them in defiance of any lien claimed by the landlord, as resulting to him, by law, from the relation of landlord and tenant; and as the second section of a statute of 1811, 2 Dig. 1059, gives a landlord a right to distrain the goods of his tenant or subtenant *only*, if a tenant shall have made a *bona fide* sale of his goods, they are not liable to distress, even though they may not have been actually removed from his ostensible possession.

Possession by a mortgagor is not *per se* fraudulent; nor is it, in general, any evidence of fraud in fact.

The possession by a mortgagor, of the mortgaged property, is not fraudulent *per se*. The judicial doctrine of constructive fraud has been carried far enough—perhaps too far. We feel neither inclination nor authority to extend it; and we are well satisfied, that both reason and authority are opposed to the position taken in the argument of this case: to wit, that a retention of possession by a mortgagor, is, *per se*, fraudulent. On the contrary, it may not, in many, and perhaps most cases, be any evidence of even a fraud in fact.

The interest of a mortgagor is not subject to

Nor is the interest of a mortgagor liable to be sold under a distress for rent. An equity of redemption

was not distrainable at common law ; and the statute of 1821, 1 Dig. 504, and that of 1828, *Session Acts*, 163, which subjected equities to sale under *execution*, cannot (consistently) be so construed as to embrace distress warrants. The policy of those enactments was to substitute the liability of equities and *choses in action* for the *ca. sa.*, and a distress warrant is within neither the letter nor the spirit of their provisions.

Second. It was not supposed to be doubted, that a mortgagee, like any other person having a title, general or special, to personal property, might maintain *trover*, for its conversion by a wrong doer. The doctrine on that point is too well settled, by analogy and direct authority, to be now doubtful or debateable.

As the circuit court decided in this case, that a landlord had a legal right, as against a mortgagee of his tenant, to distrain and sell, for rent, the mortgaged goods, the judgment must be reversed, and the cause remanded for a new trial : when the proper question for enquiry will be, whether the mortgage be, in fact, fraudulent, or *bona fide*.

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distress for rent :
the acts subjecting
equities to
ex'on, do not
subject them to
distress.

A mortgagee,
like any other
having a general
or special property
in goods
converted, may
maintain *trover*
for the conversion.

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[Mr. Buckner and Mr. Willis for Plaintiff : Mr. Brents for Defendant.]

FROM THE CIRCUIT COURT FOR ADAIR COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

May 6.

RIDDLESBARGER having obtained a judgment against Craddock, for damages for the conversion of a field of growing corn, which he (Riddlesbarger) had bought, at a sale under a *fi. fa.*, as the property of one of the defendants in the execution, Craddock now urges a reversal of the judgment, and relies on three grounds :—

Case of the sale
of a field of
growing corn—
first under a *fi.
fa.*, then under
the landlord's
distress &c.

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The judgment
&c. authorized
the *fi. fa.* under
which the sale
was made.

Perennial trees and plants, with their ungathered produce, are incidents of the soil, and not subject to execution: all the products of annual planting & cultivation are personal property, subject to sale by the owner, and were, previous to the act of 1834, subject, even ungathered & unripe, to levy & sale under execution; and the purchaser may enter upon the land, to mature and remove the crop.

2.1
An officer having levied upon a growing crop, might proceed to sell it, as soon as advertised &c.; neither he, nor the creditor, was bound to finish the culture, or let it stand at his risk.

first, that there was no judgment that authorized the execution; second, that growing corn was not liable to sale in virtue of a *feri facias*; third, that the circuit court erred in rejecting evidence offered by Craddock, and in instructing the jury, and in withholding instructions.

As we are of the opinion, that the judgment and the replevin bond exhibited in the record, authorized the execution, and sufficiently correspond with it, and with each other, for every purpose of reasonable certainty, we shall, without a more particular notice of the first ground, proceed to the consideration of the second and third grounds.

Second. Although such annual productions or fruits of the earth as clover, timothy, spontaneous grasses, apples, pears, peaches, cherries &c. are considered as incidents to the land in which they are nourished, and are, therefore, not personal, nevertheless every thing produced from the earth by annual planting, cultivation and labor, and which is therefore denominated, for the sake of contradistinction, *fructus industriae*, is deemed personal and may be sold, as personalty, even whilst growing and immature. And the purchaser of such an article in such a growing state will have the consequential right of ingress and egress, for purposes of cultivation, preservation and removal, though he will have acquired no interest in the land itself, nor any other control or dominion over it, than such as may be necessarily incident to his right to the growing *fructus*. *Parham vs. Thomson*, 2 J. J. Marshall, 159, and the authorities therein cited; and also *Eaton vs. Southby*, 2 Wilk., 131.

The authorities leave no pretext for doubting that growing corn is a chattel, and, as such, may be sold by the owner, or taken by an officer in virtue of a process of *feri facias*. The only doubt which has been intimated, is as to the proper time of selling under an execution. But, though some have expressed the opinion, that the sale should be postponed until after the corn shall have been matured and severed from the land, and though such a course might often be advantageous to

all parties concerned, still it seems to us that, prior to an act of the last legislature, the law conceded the right to sell the corn in the condition in which it was when the execution was levied on it. The right to levy implies the right to sell, as soon as legal notice can be published of the time and place of sale, and of the thing to be sold. Was it the duty of an officer to keep possession of growing corn for months after his levy, and, in the mean time, cultivate and gather it, or be responsible for its deterioration in consequence of non-cultivation, or for the wasting, or destruction, or abduction of it by the owner, or by other persons? Or was all such hazard and burthen devolved on the creditor? What might have been most expedient in a given case, or what the sheriff, (with the concurrence of the creditor and debtor or either of them,) might have done, is far different from what he had the power to do in virtue of his legal authority. And, not doubting his power to sell growing corn, we must decide accordingly. It is *our* duty to *declare*, not to *give*, the law.

Third. On the trial, Craddock offered to prove, that one of the defendants in the execution (John Jeffries, sr.) was his tenant; had rented the field in which the corn, sold under the execution, was growing; that another of the execution defendants, (John Jeffries, jr.) who planted, cultivated and claimed the corn, was the subtenant of John Jeffries, sr.; that the latter was in arrear to him (Craddock,) for rent reserved in money, and that, after the sale under the execution, the corn was distrained, and bought by him (Craddock,) for his rent. But the circuit court refused to admit the offered proof, and instructed the jury, in substance, that the corn was subject to be sold under the execution, and that the plaintiff had a right to recover the value of the corn.

The circuit court must have been influenced, throughout, by the opinion, either that Craddock had no lien on the corn; or that, if he had a lien, it did not affect the right of the purchaser under the execution. If ei-

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The landlord has a lien on the goods and chattels belonging to his tenant, and found upon the rented land, for one year's rent, or what less may be due; and the officer, who levies a *fi. fa.* on them, having notice of the landlord's claim, is bound to pay or tender to him, (or his agent) such arrears of rent; and must, thereupon, take and sell enough of the tenant's property to pay both demands.

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ther of these positions can be maintained, there is no error in any of the opinions of the court below.

The fourth section of an act of 1811, 2 *Digest*, 1060, contains the following provision : " Nor shall the landlord have any exclusive lien on the property of his tenant or under-tenant, except the same is the produce of the farm or place rented or leased." The preexisting lien implied by this provision, (which was intended as a restriction of it,) was given by the fourteenth chapter of a statute of the 8th of Anne, reenacted in Virginia, prior to the separation of Kentucky, and incorporated substantially in the statute of 1828, (twelfth section) for amending and reducing into one the execution laws of Kentucky, and which is in these words : " No goods or chattels whatsoever, lying or being in or upon any messuage, lands or tenements, which shall be leased for life or lives, term of years, at will, or otherwise, and where the rent is reserved and made payable in money, shall, at any time hereafter, be liable to be taken by virtue of a writ of execution, attachment or other process, unless the party so taking the same, shall, before the removal of such goods off the demised premises, pay or tender to the landlord, if he reside within that county, or to his agent, if any known agent he have resident within the same county, all the money due for the rent of the said premises at the taking of such goods or chattels in execution &c., *provided nevertheless*, that such rent arrear do not amount to more than one year's rent ; and if more be due, then the party suing out such execution may pay or tender to such landlord, or his agent, one year's rent, and may proceed to execute his judgment, or levy his attachment, if the proceedings be by attachment; and the sheriff or other officer serving the same is hereby required and empowered to levy, as well the money so paid for rent, as the execution money, and pay the same over to the plaintiff."

This enactment seems to extend to *all the goods and chattels* the lien which the fourth section of the act of 1811 recognized, and restricted to *the produce of the land*. But, as the lien described in the act of 1811, is that giv-

en by the statute of Anne, and as the twelfth section of the act of 1828, is a substantial transcript of that statute, the established interpretation of the latter must be deemed the true meaning and effect of the foregoing enactment of 1828.

The following points have been settled by the courts of England concerning the fourteenth section of the statute of 8th Anne :—first, that the lien applies only to the immediate landlord, and does not apply as between the ground landlord and a sublessee. *Burnet's case, Strange, 787.*

Second. That the landlord must notify the sheriff of his lien prior to a sale under judicial process, and demand his rent, or otherwise it is not the duty of the sheriff to retain the rent. *Waring vs. Duberry, Strange, 97.*

Third. If the sheriff, after sufficient notice and demand, remove or sell the goods, he is liable only for the value of the goods sold after deducting proper expenses. *Dod vs. Saxby, Strange, 1024.*

Fourth. That the lien applies only to the rent due for the year immediately preceding the execution. *Bradby on Distress, 118.*

Fifth. That a bill of sale of the goods, under the execution, is a removal of them, and vests the title in the purchaser unincumbered by the landlord's lien. *Ibid, 119 ; and, ex parte, Grove, 1 Atk. 104.*

It is not necessary to enquire, whether the rejected evidence would, if admitted, have been sufficient to prove, that Craddock had, at the time of the levy or sale, a lien on the growing crop of corn ; for we are clearly of the opinion, that his lien, even if it then existed, did not invalidate the sale, or affect the purchaser's right.

It is an indisputable rule of the common law, that goods in the custody of the law are not subject to distress for rent ; and, therefore, it is well settled, that

(taken in execution &c.) are not subject to distress for rent ; and neither the statute 8 Anne, nor any statute of Kentucky, have essentially changed this rule, though they give a new remedy—requiring the creditor who has a levy made on a tenant's goods &c., to pay the landlord his rent in arrear, not exceeding one year ; and rendering the officer who, with notice of the landlord's claim, makes such levy, *liable*, if he proceeds to sell, without satisfying the rent claim. So far only does the lien extend ; it does not affect the title of the purchaser at the execution sale. The remedy is against the creditor and officer.

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The immediate landlord *only*, has a lien upon the goods &c. of his tenant :—it does not extend to a sub-tenant's goods.

An officer who sells a tenant's goods under a *fi. fa.*, without due notice of the landlord's rent claim, is not liable to him.

The net value of the goods, is the extent of officer's liability.

The lien for rent is only for the year last preceding the levy.

A bill of sale under a *fi. fa.* is equivalent to a removal of the goods, and vests the title, free of the landlord's claim.

It is the rule of the common law, that goods in the custody of the law, (ta-

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goods taken in execution are not liable to distress until the execution be satisfied. *Bradby on Distress*, 115. It is equally well established by authority, that the fourteenth chapter of the 8th Anne did not abolish or materially affect this rule of the common law. The only object of that enactment was, to afford to landlords a new remedy, not against their tenants, but against execution creditors and officers acting under execution process, in favor of judgment creditors of tenants. According to the common law, when the goods of a tenant were taken and sold under execution, the title of the purchaser was not affected by the claim of the landlord, after removal of the goods; nor was either the creditor, or the officer who levied and sold, responsible in any way to the landlord, who had no lien. The fourteenth chapter of the 8th Anne gave to certain landlords, qualified liens, by making it the duty of execution creditors to pay or tender what was due for rent, and by making it also the duty of the officer, who sold under execution, to pay the rent, or as much thereof as the amount of the proceeds of sale, *provided he had been duly notified, prior to the sale, of the landlord's right and claim*. But it is perfectly evident, that the common-law right to sell such goods under execution, and the consequent right to purchase them, were not affected by the statute of Anne, as it has been interpreted and enforced in England. And it would certainly have been inconsistent with analogy, and with the policy of the law, to have given any other interpretation or effect to that enactment. Purchasers, under execution, of property liable to such execution, should not be presumed to have perfect knowledge of the fact that the defendant in the execution is a tenant, and that his landlord has an unsatisfied claim for rent. Should such knowledge be presumed, or should purchasers be responsible for the latent claims of dormant landlords, sales of personal property, under execution, would be greatly affected, and the rights of debtors would be unnecessarily and injuriously jeopardized.

The statute, according to its established operation,

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has given to landlords ample security, and even greater privileges than perhaps equal justice should have dictated, when it provides : first, that an execution creditor of a tenant shall, before he shall take the tenant's goods in execution, pay or tender to the landlord one year's rent, if so much be due ; and, second, that, if the creditor shall have failed to make the payment or tender, the landlord may, by giving notice of his claim to the officer acting under the execution, *before a sale of the tenant's goods*, make such officer liable to him for the amount for which the property shall have been sold, or as much thereof as shall be sufficient for paying the rent in arrear. Such, and only such, is the remedy ; such, and only such, the security afforded by the fourteenth chapter of 8th Anne, as expounded and applied in England. And what more could a reasonable landlord expect, or a vigilant landlord desire ? He may have a *priority*, to a qualified extent, over other *creditors* ; and he may have, too, (*if he will*,) the *official* responsibility of the sheriff. This is his utmost right ; and *such is the* character of his *lien*. He has no lien to any other extent, or of any other kind. The tenant may make a valid sale of his goods. *Mitchell vs. Franklin et al.* 3 *J. J. Marshall*, 482. An officer may make a valid sale under execution, and the purchaser will not be affected by the landlord's claim. *The authorities, supra, and also Bradby*, 229, and 3 *Kent's Com.* 482, and a new and improved edition of Bradby, in the " Law Library, No. III., 80-83.

Such is the "*lien*" recognised in the act of 1811 ; and such *only* the lien given by the act of 1828. The only difference between the twelfth section of the latter act, and the fourteenth chapter of 8th Anne, is, that the latter says, that no goods shall *be taken* in execution, and the former declares, that no goods shall *be liable to be taken* in execution. Such difference is verbal only. The intent and meaning of each are the same ; and, therefore, as before suggested, the effect of the Kentucky statute must be governed by the practical construction of its prototype of England.

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By the common law, property of a stranger found on rented land, was subject to the landlord's distress; but if one purchased a growing crop under ex' on, & left it to ripen, this was an exception: it was not liable. In Kentucky, the law by which the property of a stranger might be distrained for rent, has been changed by statute, and the goods &c. of the defendant in the distress warrant or some subtenant on the land, are alone liable to be taken.

Where an officer levied a *fi. fa.* on the crop of a tenant, and sold it to a stranger;—the landlord afterwards had it taken by distress for rent, sold again, and bo't it himself; and the first purchaser sued him for this conversion—it was not error to reject evidence [p. 207] offered on the trial, to show the lien the land

At common law, the goods of strangers were, under certain modifications, liable to distress whilst they were on the demised premises; and, consequently, though a purchaser from the tenant, or from the sheriff under an execution against the tenant, acquired a perfect and indefeasible title, yet, by failing, in proper time, to remove the goods from the demised land, he might have subjected them to liability to the landlord's distress.— But, by permitting growing corn to remain until it shall become ripe and fit for being severed, the purchaser would not, even according to the common law, have subjected the corn to distress for the rent due by the former owner, because such a course would be perfectly consistent with the title acquired by the purchaser, would be proper for husbandry, and would be rightful and not negligent; and, therefore, would come within the principle of the various exceptions to the general rule of the common law. *Bradby*, 112, and *Eaton vs. Southby*, *supra*, *Law Library*, No. III., 83. But this common law rule has been altogether abolished by the second section of the act of 1811, 2 Dig. 1059, which declares, that “no property shall hereafter be liable to be distrained for rent, unless the same shall belong to the person or persons against whom the distress warrant issued, or to some subtenant on the land leased or rented.” All question about the removal of the corn, by the purchaser, is, therefore, superseded.

The conclusion seems to be fair and logical, that Craddock could not have derived any benefit from the rejected evidence, as to tenancy, or as to the distress warrant issued after the sale under the execution. And, consequently, the circuit court did not err in rejecting such irrelevant proof. Nor did it err in rejecting proof as to notice to the constable, of Craddock's claim of rent; for such notice could not affect the legal right to sell, and could operate only as between the constable and Craddock. And the consequence from the whole of the foregoing view, is, that the circuit court did not err in giving, or in withholding, instructions—unless there was error in refusing to instruct the jury, that, if Riddlesbarger had notice of Craddock's

claim, as landlord, prior to the purchase of the corn, he had acquired no available right as against Craddock. But it is evident that, if, as we have decided, the corn was legally subject to sale under the execution, notwithstanding the landlord's claim to rent, notice of that claim could not affect the purchaser's right to the property which he bought.

After the sale, if the officer, having due notice of Craddock's right, as landlord, failed to pay to him the amount of the proceeds of the sale, or the amount of one year's rent, if those proceeds were equal to it, Craddock's remedy was not against Riddlesbarger, or the corn which he bought, but was against the execution creditor, or the officer who sold the corn and failed to account to him according to law.

Judgment affirmed.

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lord had on the crop when levied on, notice of it to the purchaser &c. for the purchaser under the *fi. fa.* with, or without, notice of the rent claim, acquired a good title, free of the lien, and the proof was irrelevant.

Blue et al. vs. Sayre.

TRAVERSE.

[Mr. J. E. Davis for Plaintiffs: Mr. Sayre for Defendant.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

May 7.

THIS is a traverse of an inquisition on a warrant for a forcible entry and detainer; on the trial of which, in the circuit court, the only material question was, whether the plaintiff in the warrant, who was traversee in that court, had an actual possession of the premises at the time of the entry by the defendants, who are now plaintiffs in error.

Without intending to intimate any opinion as to the true import and effect of the proofs, we are of the opinion, that the circuit court erred in instructing the jury that, if Hukill, who had entered as the tenant of the plaintiffs in error, had attorned to the defendant in error, without their consent, and had disclaimed to hold

Where a tenant disclaims holding under the landlord from whom he received the possession, and attorns to a stranger—the attornment being void in law, does not operate as a disseizin of the landlord. He may, however, elect so to consider it, and bring his action for a disseizin.

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A possession, by the mere occupancy of a tenant who disclaims holding of him under whom he entered, and, without his landlord's consent, attorns to a stranger, is of no avail to the stranger; and if the landlord, after the departure of the tenant, resumes the possession, it is no forcible entry upon the land of him to whom the tenant thus unlawfully attorned.

under them, he had thereby virtually disseized them; and that, therefore, when he left the premises, the possession in fact devolved on the defendant in error, and that, consequently, the subsequent entry, by the plaintiffs, should be deemed a forcible entry upon the actual possession of the defendant.

No such attornment could have had any such operation—it would have been utterly void and ineffectual; the attornment would itself have been an implied disclaimer; and an express disclaimer would have been equally ineffectual. The legal character and effect of the relation of landlord and tenant cannot be changed by an illegal attornment, or by a mere disclaimer, which cannot be deemed as amounting to an actual disseizin, unless the landlord elect to consider it as a disseizin.

Unless the defendant had obtained the actual possession by some other means than the attornment or disclaimer by the tenant of the plaintiffs, they were not guilty of a forcible entry. We do not mean to decide, whether she might be deemed to have been in possession in fact at the time of the entry of which she complains. We intend to be understood as deciding only, that an attornment and disclaimer by the tenant of the plaintiffs, without their consent, and during his occupancy, did not (alone) operate as a disseizin, or as a transference of the actual possession to the defendant; and that, without other proof, she should not be deemed to have had the possession in fact when the tenant abandoned the premises. And, consequently, whatever should be the effect of other facts which may have appeared on the trial, the instruction which we are considering must be deemed erroneous, and may have been prejudicial.

Wherefore, we feel constrained to reverse the judgment, and remand the case for a new trial.

Spring Term
1834.

Yates' Will.

[Messrs. Wickliffe and Wooley and Mr. Chinn for the will : Mr. Crittenden and Mr. M. C. Johnson contra.]

FROM THE FAYETTE COUNTY COURT.

Judge NICHOLAS delivered the Opinion of the Court.

May 7.

THE validity of this will has been contested on two grounds.

The grounds on which the validity of the will was contested.

First. The want of capacity on the part of testatrix, and an undue influence and management used in procuring the will to be executed.

Second. That, at the time of its execution and of her death, the testatrix was a married woman ; that her husband has never assented to it, and is now resisting its probate.

As to the first ground, we will merely remark, that there was no sufficient proof of any improper influence or management in procuring the will, and that the weight of proof is decidedly in favor of her mental capacity and competency. The draftsman of the will and the subscribing witnesses—all men of respectability, intelligence, and disinterested—testified so unequivocally as to her capacity, as greatly to outweigh the less positive and satisfactory, though equally respectable, testimony adduced on the other side. The court, upon a full consideration of the whole testimony, has had no hesitation in coming to the conclusion, that the testatrix was of sufficient capacity to make the will, and we therefore deem it unnecessary to make a detail and comparison of the evidence.

The competency of the testatrix, and that the will was not procured by undue influence or management, satisfactorily proved.

In answer to the second objection urged against the probate, there was produced in support of the will, two deeds of trust,—the first from the husband of the testatrix, to a trustee, conveying certain slaves and personal estate, in trust, for the separate use of the testatrix, with a power of appointment by deed or will ; the other

The deeds of trust, with powers of appointment &c. relied on, as authority for the testatrix—a *feme covert*, to make the will.

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from the husband, the testatrix and trustee, conveying to another trustee the trust fund, together with some land which had been purchased with the trust money, to be held in trust, for the use of the husband and the testatrix during their lives, with power for her to dispose of the property, after their deaths, in such manner as she might appoint, by deed or will. These are relied on as authority for the wife to make a will, and as presenting a state of case requiring its probate.

To the general rule, that a married woman can not make a will, there are exceptions. In certain cases, and for certain purposes, her will is valid. But her will disposing of personalty, cannot be received in a ct. of law or equity, without previous probate.

There are well established exceptions to the general rule, that a *feme covert* cannot make a will. Where she is an executrix, she can make a will, so far as to appoint an executor, for the purpose of thereby transmitting the executorial trust. She can make a will in pursuance of an agreement with her husband before marriage; or in fulfilment of a power of appointment, reserved by herself, or delegated to her by another; or in consequence of her proprietorship of a separate estate, her dominion or right of alienation over which, is held to authorize her to dispose of it by will. In none of these cases, where the law allows her to make a will, can her will of personalty be received or recognised, in either a court of common law or chancery, without a previous probate in a court of probates. It would be in vain therefore to contend, that in no state of case should a court of probate admit the will of a married woman: nothing but the most positive and unambiguous legislation could give countenance to such an anomaly in the law.

Statute of wills, sec. 1, applies to land only—and the like statute of H. 8, has never been held to prevent a *feme covert* from devising land under a power of appointment.

Formerly, in England, probate of the will of a married woman was refused, if the husband objected: otherwise now,

The first section of the statute of wills applies to devises of real estate merely, and could therefore have no application to a devise of personalty, but is, in fact, only of the same import as the statute of wills of Henry VIII., and that has never been held to prevent a married woman from devising real estate under a power of appointment.

It was formerly the practice of the ecclesiastical courts in England, to refuse probate of the will of a married woman, if the husband objected thereto. But

the settled practice now is to admit it, notwithstanding his objections, in all cases where she has the right to make a will without his assent. *Williams on Executors*, 42.

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Where the will of a *feme covert* is offered for record in the county court, it should appear, *prima facie*, that she had authority to make a will; and then the court, without undertaking to investigate the sufficiency of the authority, should admit proof of the due execution, and order the will (if proved) to be recorded—leaving it to other tribunals to decide upon its effects. But the order should be so limited as not to deprive the husband of his right to administer on such other estate of his wife, as was not subject to her disposal by will—of which administration should be granted to him.

As the general rule is, that a married woman cannot make a will, it is no doubt necessary to shew at least a *prima facie* case to authorize it; such as that she was executrix, had separate estate, or power to appoint by will, before probate will be allowed. But it is said by *Williams on Executors*, 42, 211, that though where the will, sought to be established, was made by her under a power, the instrument creating the power must be exhibited by the executor, with his allegation. Yet the ecclesiastical court will not look nicely into the question, whether the appointment is authorized by the power, as the grant of the probate does not determine that right, but leaves it open to the decision of the temporal courts. We have not had access to the cases which he cites in support of this position; but it is so manifestly proper, that we do not hesitate to adopt it, as the most expedient rule for the government of our courts of probate in such cases. Our county courts are illy qualified, from their structure and organization, to investigate and determine the sufficiency of the execution of a power of appointment by will—involving, as the question may well do, some of the most abstruse and difficult learning of the law. Besides, there is no reason whatever for imposing so unwonted a duty on those tribunals, inasmuch as the admission of the will to probate, in the proper manner, can prejudice the rights of no one. It is sufficient that the county court sees that there exists a state of case in which it might be right and proper that a married woman should make a will, to allow it to be proved and recorded, leaving it to other and more appropriate tribunals to determine what effect it has when recorded.

We shall, therefore, decline entering upon the questions discussed in this case, whether the deeds of trust secured such a separate estate to Mrs. Yates, in the property, as authorized the making a will; or whether her

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will is a proper execution of the power of appointment secured to her. It is sufficient, that we see that she had a power to appoint by will. This presents the *prima facie* case, which we think requires the allowance of the probate.

But this allowance should extend no farther than the reason and necessity of the case require. It should not extend to depriving her husband of his right to administer on any estate which she might have had, not secured to her as her separate estate, and over which she had no power of appointment. We are told by Williams, that the probate of the will of a *feme covert* should not be general, but limited to the property over which she has a disposing power, and administration of the other part of her property (which is called an administration *oalerorum*) must be granted to the husband.

As the probate granted by the county court, in this case, was absolute and without restriction, the order granting it must be reversed, with costs, and the will remanded with directions to admit it to record as the last will and testament of Molly Yates, of all such property as is embraced by a certain deed, bearing date the 14th June, 1813, from Michael Yates to Richard Chiles, and also, by another deed, bearing date the 23d December, 1825, from Richard Chiles, Michael Yates and Molly Yates, to John Johnson, or of so much of said property as the said Molly Yates had the power of disposing by will; and the copies of said deeds used on the trial here, must be certified to said county court, to be recorded with said will as appurtenant thereto.

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1884.

Warner's Executors vs. Reardon.

APPEAL
FROM A J. P.

[Mr. Chinn for Plaintiffs: Mr. Crittenden for Defendant.]

FROM THE CIRCUIT COURT FOR WOODFORD COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

May 8.

THIS writ of error is brought to reverse a judgment in favor of Nancy Reardon, on an appeal from a judgment upon a warrant which was issued in favor of the executors of Elijah Warner, on a note payable to him, which she had executed and delivered to his agent, Reuben Beemen, in consideration of a clock, which the agent had sold her; and respecting which he delivered to her, simultaneously with her delivery of the note, the following writing:—"I warrant the clock that I have sold to Mrs. Nancy Reardon, to perform well, or agree to furnish her one, in the place of it, that will perform well. Should we fail to furnish her a good clock, we agree to take the said clock back *without pay*—May 13th, 1829.

Reuben Beemen,
Elijah Warner."

The proof on the trial, was, that the clock was worthless as a "time piece;" that an agent of Warner put another clock in its place, but which was as worthless as the first; and that Mrs. Reardon, not long afterwards, requested a man, who *said* he was one of Warner's agents, to take the clock away, but that he did not take it; and that the materials were of some little value.

On this proof, the jury found a verdict against the executors; and the court refused to grant a new trial.

There was an obvious consideration for the note. But the foregoing instrument of writing may be deemed a defeasance. It should not be so construed, however, as

the proof *aliunde*.—But the clock-maker having taken back the clock, under his agreement to furnish another and a *good one*, if the first did not perform well, or have no pay—the delivery of a *good clock*, in lieu of the one taken back, became a *condition precedent*; the performance of which he must prove, before he can recover on the note.—The clock being left at the purchaser's house, must be deemed, not an acceptance of it by him, but merely a willingness to try it.

A clock-maker sells a clock, and takes the note of the purchaser, to whom he gives a writing, warranting the clock sold, and stipulating, that, if it does not perform well, he will take it back and furnish one that will, and that, if he fails to furnish a good one, he shall have no pay: held that this writing, connected with proof that the clock was bad, and was returned, or tendered back—or that there was a sufficient excuse for not offering to return it, would amount to a defeasance of the note. But the writing will not by itself amount to a defeasance; and would not be available as a defence to an action on the note, without

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to operate an extinguishment of all cause of action on the note, unless, in addition to the facts which were proved, there had been some proof of a tender, or notice, to Warner, or to his agent; or unless there had been proof that Beemen and Warner had no place of known residence in this state where notice could be given; or unless, by taking back the first clock, the *onus* is devolved on the obligee, of shewing, as a condition precedent, that the substituted clock was a "good" one.

There is no proof that the person to whom the tender was made was Warner's agent. His declaration that he was an agent, is no proof whatever of the fact. Nor is there any proof tending to shew, that the residence of either Warner or Beemen was unsettled, or unknown. And we are of the opinion, that, had not the second clock been substituted for the first, the fact, that the first was not a good clock, would not, of itself alone, have been sufficient to bar the action on the note, because the agreement to warrant the goodness of the first clock, or to put a good one in its place, was executory, and a breach of it would have been the foundation of an action, and should not operate as a defeasance of the note. But when the first clock was taken back, it became the property of Warner; and the agreement was that, unless a good clock should be put in its place, it should not be paid for. It seems to us, that when the first clock was taken back, the placing of a good one in its place, was a condition precedent, without performing which, Warner could not have a legal right to coerce the amount of the note. Had Warner, or his agent, not put any clock in the place of that which was sold and afterwards taken away, surely, according to a sensible and effectual interpretation of the defeasance, Mrs. Reardon would not have been liable to pay the amount of the note; and, by a parity of reasoning, it appears to us, that until a "good clock" was substituted, the note was not collectable, after the first clock had been taken back.

As the proof abundantly shews, that the substituted clock was not a *good* one, and that, therefore, a "*good clock*" was not put in the place of that which was sold,

and afterwards taken back—we are of the opinion, that the verdict and judgment are sustained by the proof and by a just and proper interpretation of the defeasance.

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If the second clock had not been furnished, or was not a good one, Warner was bound to keep the first without pay, after having taken it back; that is, when he took it back, he took it without pay, unless he furnished another clock and a good one.

Permitting the second clock to be left in her house, should not be deemed an acceptance of it by Mrs. Reardon, in lieu of that which was taken away; but should be understood only as evidence of her willingness to make an experiment for ascertaining whether it was a good clock, and whether her note should become payable or not: and, as it proved to be no better than the first, the latter must be deemed to be taken back “without pay;” and consequently, the note for the amount agreed to be paid for it, should not be enforced.

The second clock is the property of Warner; and, not being such an one as he undertook to deliver, in lieu of that which he sold and afterwards took back, it cannot, of course, entitle him to “pay” for the first, or form any consideration for the note.

Judgment affirmed.

Allen vs. Kopman.

DEBT.

[Mr. Monroe for Plaintiff: Mr. Crittenden for Defendant.]

FROM THE CIRCUIT COURT FOR JEFFERSON COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

May 8.

THIS was an action of debt upon a note. Plea, *non est factum*. The evidence consisted of a single deposition, conducing to prove a material alteration in the note, by the payee, after its delivery. The jury, after retiring

If a judge, while instructing or addressing a jury, uses language calculated to induce them to believe

that it is their duty to decide a fact submitted to them, one way or another, as by telling them, that “it is the plainest case he ever saw in court”—“that the note *was* proved to have been altered” or the like—the jury being the triers of the facts, the evidence of which they are to weigh—he commits an error, for which the judgment may be reversed.

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to consult of their verdict, returned into court, for the purpose of asking instructions as to the law. Among other things, they enquired, whether they were at liberty to try the justice of the claim, or was the contest confined to the alteration of the note? The Judge answered, that the only enquiry for them was, whether the payee of the note had any authority or not from defendant, to strike out Philadelphia, and insert Louisville, Ky. as the place of payment, and if the payee had no such authority, they should find for the defendant. Upon the expression of doubts by the jury, in relation to the case, the Judge said, "that it was the plainest case he had ever seen in court; the note was at first made payable in Philadelphia, and was proved to have been altered to Louisville, Ky." One of the jury remarked to the court, "that the testimony of Shain, the witness, was so contradictory as not to be satisfactory." The counsel for the plaintiff then moved the court to instruct the jury, "that if they thought the deposition of Shain contradictory, they might discredit his whole evidence, and if they did, they should find for the plaintiff;" but the court took no notice of the motion, believing it to be out of order to ask an instruction after the jury had retired to consult of their verdict, and had only returned into court to make their own enquiries.

The jury are the exclusive judges of the facts. They may be told by the court, in certain cases, if they believe all the evidence they should find for this or that party, but the court has no right to tell the jury that they should, or are bound to, believe that the evidence established any particular fact. If the court can do this, it would take from the jury their peculiar province of weighing the credibility of witnesses and the strength of their testimony. If the jury err on these points, the court may grant a new trial, and that is the only corrective. We think the bill of exceptions shews, that the Judge (inadvertently no doubt,) transcended the limits circumscribed by law, in declaring "that it was the plainest case he had ever seen in court; the note was at first made payable in Philadelphia, and was proved to have been altered to Louisville, Ky." The very fact

which the jury were trying was, whether "the note was at first made payable in Philadelphia," and afterwards so altered, without authority, as to be payable at Louisville, Ky. The court undertook to declare how the fact was, in reference to the proof, and as it related to the place of payment; and when a juror expressed his dissatisfaction, owing to the deposition being contradictory, as he conceived, the court gave no explanation on that point, but permitted him to retire under the influence of a positive assertion by the court, that "the note was at first made payable in Philadelphia, and was proved to have been altered to Louisville, Ky." If the jury disbelieved the deposition, they might have concluded that the note when executed and delivered was made payable at Louisville in the first instance. We do not say the jury ought to have disbelieved the deposition.

For this irregularity, amounting we think to an error in law, we deem it right to reverse the judgment, and grant a new trial.

The plaintiff in error must recover his costs.

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Hickman
vs.
Anderson.

Hickman vs. Anderson.

DEBT.

[Mr. G. Armstrong for Plaintiff: Mess. Morehead & Brown for Defendant.]

FROM THE CIRCUIT COURT FOR OLDHAM COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

May 8.

ANDERSON brought an action of debt against Hickman and McGruder jointly. The writ being executed on both, McGruder appeared, and filed the plea of *non est factum*, upon which an issue was formed. Thereafter, Anderson withdrew his replication to McGruder's plea, and dismissed the action as to him, but took judgment by default against Hickman.

If two joint obligors are sued, and one pleads *non est factum*, has a verdict in his favor upon the issue, and judgment in bar, the plaintiff may proceed to take judgment against

the other obligor. But he cannot dismiss the suit as to him who pleads in bar, leaving him thereafter liable, and proceed against the other: the latter, if sued alone, might plead the nonjoinder of his co-obligor in abatement, and cannot be deprived of the effect of this right, by such dismissal.

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The judgment must be reversed. If the plaintiff (now defendant,) had submitted the trial of the issue to a jury, and the jury had found for McGruder, then, as he would have been discharged from all future liability on the note, and might have pleaded the judgment rendered, in bar of any future action founded upon it, he might have taken his judgment against Hickman, with propriety, according to the principle of the case of *McGowan vs. McCoun*, 3 *Marshall*, 153. But as McGruder was not discharged, it was error to take judgment against Hickman. If he had been sued separately, he might have pleaded in abatement, the non-joinder of McGruder. The voluntary dismissal of the suit as to McGruder, ought not to place Hickman in a situation where he could not take advantage of the non-joinder of the joint obligors in the same action. The principles of the case of *Shields vs. Perkins*, 2 *Bibb*, 229, settles this.

Judgment reversed, with costs, and cause remanded.

CHANCERY.

Warfield's Administrators against Boswell and Others.

[Mr. Chinn for Plaintiffs: Messrs. Wickliffe and Wooley for Defendants.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

May 9.

Chief Justice ROBERTSON delivered the Opinion of the Court—
Judge Nicholas dissenting.

Bill for relief against a judg't, on a note given for an equal amount of depreciated bank paper, on the ground of usury. — Answer, denies the usury and loan was a sale of the bank notes. Bill dismissed below.

In this case, the circuit court dismissed a bill filed by Warfield's administrators, for relief against a judgment on a note to Boswell, which was given on the 4th of January, 1822, and made payable on the 5th of February, 1823, with six per centum interest from the date, for three thousand dollars in specie, in consideration of that nominal sum in notes of the Bank of Kentucky, then greatly depreciated, which Alexander Parker had received from Boswell, on the day of the date of the note, and in which note Warfield was bound as surety for Parker.

The bill charges, that the transaction was an *usurious loan*. The answer avers that it was a *bona fide sale*.

The only proof in the case, is that which may be derived from the foregoing facts, and from the testimony of three witnesses. One witness swears, that Boswell told him, that he had "*let Parker have*" three thousand dollars in notes of the Bank of Kentucky, for his note, payable in thirteen months, for three thousand dollars in specie, and six per cent. interest thereon from the date of the note. Another witness swears, that on some occasions, he had heard Boswell say, that he had loaned to Parker the three thousand dollars in Kentucky Bank notes; and that, on some *other* occasions, he had heard him say, that he had sold the notes to Parker. The third witness swears, that he had heard Boswell frequently say, that he had loaned the notes to Parker; but afterwards he swears, that he had heard Boswell say, that he had *sold* the notes to Parker, and that he is not "*sure*" that he said he had *loaned* them.

This is obviously a much stronger case of usury than that of *Boswell vs. Clarksons*, (1 J. J. Marshall, 47;) for in that case, the subscribing witnesses swore, that the note was given in consideration of the advance of Kentucky Bank notes *in the form of a sale*; and in this case, there is not only no such testimony, but there is, as already stated, proof that Boswell had said that he had loaned the notes to Parker.

Although bank notes, though current as a circulating medium, like those of the Bank of Kentucky, in 1822, are vendible. nevertheless they are more frequently the subjects of loan, than of sales on a *credit*; and when they are actually sold on credit, it is not reasonable to presume that the purchaser will agree to give double their value, and interest also. In such a transaction, the obvious presumption will be, that whatever is promised beyond the actual value of the paper, is exacted and agreed to be given for "*forbearance*;" and we cannot doubt that, when one man lets another have, as in this case, depreciated current bank notes of the value of one thousand five hundred dollars, upon a promise to refund the nominal amount and legal interest, in specie—

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The proof—
which fails to establish the fact of a sale of the notes, but rather conduces to prove they were lent.

Where one party delivers to another, depreciated bank notes and takes an obligation for their nominal am't, payable in specie, at a future day, with interest—the transaction, nothing else appearing, must be taken to be a usurious lending.

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nothing else appearing—the transaction should be deemed *prima facie* a loan. This would be the only rational or probable deduction from the intrinsic character of such isolated general facts. A, desiring to use immediately one hundred dollars in bank notes, worth only fifty dollars in specie, applies to B for the notes—B delivers to him a bank note of the denomination of one hundred dollars, worth only fifty dollars, and takes his promissory note for one hundred dollars in specie, payable in one year, with legal interest from the date. No other fact appearing, A affirms, that the transaction was a loan, and B insists that it was a sale: can there be a reasonable doubt, that "*loan*" is impressed on its face? It has all the features of a loan; and if it should not be deemed a loan until the contrary be made *clearly* to appear by proof *aliunde*, no transaction could ever be considered as a loan unless the words "*borrow and lend*" be *expressly* used in the contract!

Held, that the evidence (above recited, unexplained by other facts, tends to fortify the presumption of usury.

But here the extraneous facts fortify the inference necessarily resulting from the apparent character of the transaction itself.

If, in such a case, a party can entrench himself behind an *answer*, calling that a sale *in form*, which exhibits the aspect of a *substantial loan*, an easy mode of evading the statutes against usury will have been discovered, and, the statutes themselves may become, easily and soon, altogether useless and inapplicable.

The presumption arising from the simple facts of this case, could scarcely be repelled; at least, there should be strong rebutting facts, before the transaction should be declared to be a sale, and not a loan.

But, as we have before suggested, the *prima facie* presumption is not only not rebutted, but is corroborated by the extrinsic facts.

Relief decreed to the amount of the usury.

Wherefore, this court, (Judge *Nicholas* dissenting,) is of the opinion, that the circuit court erred in withholding the relief sought by the bill; and therefore, the decree must be reversed, and the cause remanded, with instructions to decree relief to the extent of the difference between specie and the market value of Kentucky Bank notes, at the date of the note for three thousand dollars.

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Harper vs. The Lexington and Ohio Rail Road Company.

[Mr. Haggin for Appellant : Messrs. Morehead and Brown for Appellee.]

FROM THE WOODFORD COUNTY COURT.

Judge UNDERWOOD delivered the Opinion of the Court.

May 9.

THE proceedings in this case cannot be sustained. The sheriff should make a return upon the warrant in virtue of which he held the inquisition, shewing that the fifteenth section of the act of incorporation had been complied with in respect to all the duties imposed on him. Thus, he should in substance state, that he had, in obedience to the warrant, summoned and empanelled a jury in the manner required by law ; that he had administered to each of the jury an oath or affirmation (as may be the case,) justly and impartially to value and assess, according to law, the damages which the owner of the land would sustain by the use and occupation of the land, as required by the company, and that the jury so empanelled and sworn, had made out, signed and sealed their inquisition, which he returns with the warrant to the clerk of — county. There is no evidence here, that the jury were ever sworn. That is indispensable. There is no return upon the warrant as to the manner of its execution by the sheriff.

Upon the return of the case, we see no reason why the sheriff should not be permitted to make a return ; and if it will be such as to sustain the proceedings, the court may give judgment accordingly.

We do not perceive the necessity for giving the owner of the land personal notice of the time and place of the meeting of the jury, as contended for by the counsel for Harper. The law has not required such notice, and, therefore, we are not disposed to regard it as indispensable, although there is much propriety in giving it. There may be cases where it could not be given

In a proceeding to ascertain the damages to the owner, upon the appropriation of land for the Lexington and Ohio Rail Road, the sheriff's return must show, that all the requisitions of the act incorporating the company (§15,) have been complied with.

The sheriff may make a return after the case has been reversed, and remanded for new proceedings — on which, if it is sufficient, the court may give judgment.

It is not indispensable that the notice to the owner of the land, should be by personal service.

A return of the writ "executed" implies a legal notice to the owner of the land.

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except by advertisement against persons unknown. In this case, however, we suppose from an endorsement on the warrant of "executed," and all the subsequent proceedings, that Harper had notice. The jury are to make their assessment upon their own view, and hence there is not the same necessity for notice as if they had to decide on evidence furnished by the parties.

The finding of the jury is sufficiently explicit for all legal purposes.

Judgment reversed, with costs, and cause remanded for proceedings not inconsistent herewith.

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RET. & SUM.

Downing vs. Major.

[Mr. Haggin and Mr. Sanders for Plaintiff : Mr. Crittenden for Defendant.]

FROM THE CIRCUIT COURT FOR WOODFORD COUNTY.

May 9.

Judge UNDERWOOD delivered the Opinion of the Court.

The agreements which lawyers may make with their clients, for fees, are not restricted by law; and where there is no special agreement, the law will allow compensation, according to the value of the services.

Contracts between lawyers and clients are subject to a severer scrutiny than those of ordinary men. —If it appears, that a client, suddenly discovering, that he is in a perilous condition, by reason of an unexpected occurrence in relation to his counsel,

As a petition for a rehearing has been presented, we deem it proper to state the point which governed the decision of the case. We do not suppose that four hundred dollars divided between Messrs. Haggin, Monroe and Sanders, as counsel, for their services in defending the son of Major, upon an indictment for murder, could be regarded as an exorbitant fee to each. There is no law regulating the amount of the fee which an attorney may demand of his client. Unless there be a special contract, the law fixes the compensation according to the value of the services rendered. Contracts between attorney and client, are strictly and rigorously examined by the chancellor. Whenever the contract grows out of circumstances superinduced by the attorney, and by which the will of the client is made to bend and yield to his influence, and in consequence, to assent to the payment of an amount which otherwise never would have been agreed to, relief should be afforded.

We look upon Major, the father, as the client. The contract now the subject of investigation was entered into after the relation of attorney and client had been

fully established. The father had employed T. T. Crittenden, at one hundred dollars, and Sanders, without a stipulated sum, as counsel for the son. The services of these two were relied on exclusively, up to the moment when the trial was to commence. The court, however, refused to let Mr. Sanders appear as counsel in the defence, because he had disqualified himself to practice law by the acceptance of a challenge to fight a duel. He thereupon, introduced Messrs. Haggin and Monroe, as his substitutes; for it does not appear, that the accused, or his father, had spoken to either of them to defend the prisoner before Mr. Sanders was rejected by the court. When Messrs. Haggin and Monroe were introduced, and took upon themselves the defence, the court was moved to postpone the trial several days, to allow them time for preparation. The court took a recess for an hour. This time was devoted to arranging the fees. At first five hundred dollars was asked. Major refused to give it. Four hundred dollars were then proposed as the amount to be divided between Messrs. Haggin, Monroe and Sanders. Major reluctantly assented, and gave his notes for one hundred dollars, to Mr. Haggin, one hundred dollars to Mr. Monroe, and two hundred dollars to Mr. Sanders. This, however, was not done until Major had directed that another attorney should be sent for, and was informed that he had left town, and until Major was told that Messrs. Monroe and Haggin would abandon the defence unless he gave his notes as required. Moreover, Mr. Sanders, according to the proof, told Major, before he gave the notes, "to do it, so that they might progress with the case, and that on his part, he would make it easy with him; that those other lawyers wished him not to be loser in consequence of his misfortune in accepting a challenge." Major was told, but by whom the witness does not state, that unless he came into the proposed arrangement as to the fees, his son would lie in jail until the next court. Major protested against paying the note given to Sanders, at the time; at least, such was the fact according to one witness.

Now, we think it impossible to view the facts aforesaid, and the other circumstances in the case, without

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—is induced to agree to hard terms with certain lawyers, for want of time to seek the aid of others; or, if it appears, that the client is persuaded by an attorney already retained, to make such a bargain with others to be associated with him, as he would not have made, but for that persuasion — the chancellor will relieve the client from the contract, or from the excess above a fair compensation for the services rendered.

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coming to the conclusion, that Major submitted to the influence of Sanders, and the necessity imposed on him, growing out of the voluntary conduct of Sanders, in disqualifying himself for the practice of law. In the situation in which Major was placed, he was compelled to commit the defence of his son to one attorney only, or to delay the trial until another term, and suffer the prisoner to remain in jail, or to hunt for, and engage, other counsel at the instant when the trial was pressing, and when the attorney he would have selected had left town, as he was informed; or to give his notes as required. If Mr. Sanders, upon disqualifying himself for the practice, had not continued to excite the belief, that the court, upon the petition of the prisoner, would allow him to act as counsel in the defence, Major might have prepared himself with another attorney, to associate with Mr. Crittenden, in the place of Mr. Sanders. Judging from the amount of fees actually paid to the attorneys in this case, we cannot resist the conviction, that, if Major had been allowed sufficient time, he could have procured a substitute for Mr. Sanders at three hundred dollars, being one hundred dollars less than the aggregate of the notes executed to Messrs. Haggin, Monroe and Sanders. Major was deprived of an opportunity to do this, by the conduct of Sanders; and therefore we think it wrong, that advantage should be taken of the urgency of the circumstances which surrounded him. Believing that it was a mistake on the part of Sanders, in supposing he would be allowed to defend, notwithstanding his acceptance of the challenge, and not an intentional misrepresentation, yet the mistake operated as severely as if it had been a fraud.

We think there is no error as to the extent of relief afforded. Sanders received twenty or thirty dollars for services rendered in the cause, exclusive of the note for two hundred dollars. It does not appear, that his services in court were more valuable than those of either of the other attorneys engaged in the defence. The amount which they received is a fair criterion by which to estimate his services. The decree must be affirmed, with costs.

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Gaines vs. Conn's Heirs.

Writ of Right

[Messrs. Wickliffe and Wooley for Appellants : Mr. Chinn for Appellee.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

. This case was decided at the Spring Term, 1832; but, by some accident, was omitted in the Reports of that period, and is now first published.

Chief Justice ROBERTSON delivered the Opinion of the Court. May 7, 1832.

THIS case was once before in this court. (*Vide 2 J. J. Marshall*, 104.) At the term succeeding that at which the mandate of this court was entered in the circuit court, an amended replication to the plea of non-tenure of the freehold, was filed, and a proper issue concluded; and at the same term, a suggestion of the death of one of the demandants (Mrs. Flournoy,) was made by the appellant, and entered on the record. Afterwards, at the next succeeding term, Mrs. Flournoy's death was pleaded in abatement; but the court having sustained a demurrer to the plea, the appellant offered another plea in abatement, *post ul. con.*, alleging the death of another of the demandants (Mrs. Ready,) since the last continuance; which last plea the court would not permit the appellant to file; but entered an abatement of the suit as to Mrs. Flournoy, and Mrs. Ready, and their husbands; and thereupon gave judgment against the appellant, for all the land claimed in the count, upon facts agreed, on the first trial, prior to the reversal by this court.

The appellant now complains of the decision on his pleas in abatement, and of the final judgment for the land.

The second plea in abatement was rejected by the circuit court, because a demurrer had been sustained to the

ded when the first plea was filed, or which existed before the last continuance, is not available at a subsequent term. But a former plea in abatement, or in bar, is no objection to filing another, alleging matter that has occurred since the last continuance.

Case] formerly here.—Proceedings and judgment in the circuit court after the return of the mandate.

Matter in abatement that might have been pleaded

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first plea in abatement. If the counsel for the appellant were correct in stating, in his brief, that the second plea was not filed until the term succeeding that at which the first plea was overruled, the reason assigned by the circuit judge, for rejecting the second plea, would be inapplicable, and consequently insufficient. For although it would be improper to permit matter to be pleaded in abatement which might have been well pleaded when a former plea in abatement had been filed by the same party in the same suit, or which had occurred before the last continuance; yet a plea in abatement containing new matter which occurred after the last continuance, may be filed, even though the party offering it had made ever so many abortive attempts, at a former term, to avail himself of other matters of abatement.

When it is said, that a second plea in abatement, or a second plea *puis darein continuance*, whether in bar or in abatement, shall not be allowed, all that is meant, is that a second plea in abatement shall not be indulged, if the matter pleaded existed when a former plea had been filed; and that after disposing of one plea *puis darein continuance*, another shall not be filed at the same term. But if after a continuance, matter either in abatement, (as the death of the plaintiff,) or in bar, (as a release of the cause of action,) shall occur, there can be no doubt that it may, at a proper time, be made an available defence by plea, although, at a former term, a plea of other matter in abatement had been filed, or an issue on matter in bar had been concluded. But it appears from the record, that the first and second pleas in abatement were both filed at the same term, and each as a plea *puis darein continuance*. Therefore, it does not appear, that there was error in the rejection of the second plea, because that plea does not aver that the death alleged by it, occurred after the filing of the first plea.

Nor can this court decide, that the circuit court erred in sustaining the demurrer to the first plea in abatement. No objection seems to have been made to the form of the plea, or to the time of filing it; but it appears probable, that the demurrer was sustained only because the circuit judge deemed the death of one of the

A writ of right abates by the death of any one of the demandants: *post*
The death of a party, suggested on the rec-

demandants insufficient to abate the writ. In that particular this court cannot concur with the circuit court.— But as the appellant had, at a former term, suggested on the record the fact relied on in his plea, he was thereby estopped to plead that it had occurred “*since the last continuance*,” and as the record contradicted his plea, and shewed that the matter relied on was not *then* pleadable, we are of opinion that the judgment on the demurrer should not be disturbed.

But the judgment in chief is erroneous.

First. After abating as to some of the demandants, the whole of the land which they all claimed, should not have been adjudged to the survivors, unless it had appeared, that the right to the whole survived to them; and there is nothing in the record which proves any such survivorship. For aught that appears, the deceased demandants may have left children.

Second. The death of some of the demandants, *ipso facto*, abated the action. None of the statutes, authorizing revivors, have been, or can be, construed as applicable to real actions. A survey of the whole of them will shew clearly, that they apply exclusively (so far as they embrace common law suits,) to personal actions. If, therefore, the *femes* who died pending this suit in the circuit court, and before judgment or trial, had left any legitimate issue, the action would have been thereby abated; because there would have been no survivorship to the other demandants, and there could have been no revivor in the names of the heirs.

But if the deceased demandants left no other heirs than their co-demandants who survived, it might be argued that the action survived, and that, therefore, as revivor was not necessary, the suit should not abate in consequence of the deaths. But such a position, however specious and reasonable, cannot be maintained as the doctrine of the law. The fifth section of the act of 1796, concerning abatements and revivors, 1 *Digest*, 50-1, is an embodied transcript, in substance, of the British statutes of Charles II., c. 8—and of the 8th and 9th William III. c. 2, *sec.* 6 and 7. So much of the lat-

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ord at one term, cannot be pleaded in abatement at a subsequent term, by plea *puis darrein continuance*: the record is an estoppel.

Surviving demandants in a writ of right, cannot have a judgment for all the land, when no right of survivorship appears by the record. Nor can any judgment be rendered in the action after an abatement as to one of several demandants, by his death, whether the whole right survive or not: for the suit abates, and none of the statutes authorizing revivors, apply to real actions.

The death of either party between verdict and judgment, in any action, shall not abate, or affect the suit; Act of '96, §5—but this act does not apply to the death of a party before trial.

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ter part of the act of 1796, as provides, that the death of either party *between the verdict and judgment*, in any action *real, personal or mixed*, shall not abate, or otherwise affect the suit, was taken from the statute of Charles II., and does not apply to the death of a party prior to the trial.

The other provisions in the act of 1798, were copied from the 6th and 7th sections of the statute of W. III.; and the statute of William, when the sections 6 and 7 are read together, in juxta-position, as they stand on the statute book, will be seen to apply only to personal actions, or such as might be revived, if revivor should become necessary, by the personal representatives; and such has ever been the judicial exposition in England. *Tidd's Pr.* 1027.

So much of the act of 1796, as provides, that a suit shall abate by the death of one joint plaintiff or defendant, if the cause of action would survive, was copied from the 7th section of the statute of William, and it seems that conflicting decisions in England, as to the cases of survivorship in *personal actions*, in which a death *pendente lite* should or should not abate the suit, induced the enactment of that section of the British statute.

In real actions, it is said, that if there were two demandants, either of them might, by summons and severance, proceed for his moiety alone; but if either of them should die without issue, the suit would abate, though the title survived; and the reason assigned, is, that otherwise "the writ would have a double effect, viz. : in case of summons and severance for a moiety, and in case of survivorship for the whole." *Ba. Abr. Abatement, F.*

What might have been the reason for not including real actions in the statute of William, or whether there was any sufficient reason, we are not now to enquire. They were not included, but were left as the common law had settled them; and there is abundant authority to shew, that without some other statutory provision to the contrary, the death of one demandant before verdict,

must abate the suit, even though the title may survive to surviving demandants. *Ba. Abr. supra.*

We cannot doubt, that the statute of 1796, was not intended to have, and should not be allowed to have, any other or greater operation than the statutes of England, of which it is composed.

Wherefore, we are of opinion, that by the death of two of the demandants, the writ in this case was abated, even if their right survived to the surviving demandants. And consequently, as the deaths appeared upon the record, the circuit court ought to have abated the writ *in toto*.

Judgment reversed, and the cause remanded, with instructions to abate the writ.

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DECISIONS
OF
THE COURT OF APPEALS
OF KENTUCKY
AT THE
FALL TERM, 1834.

Estill and Wife vs. Fort.

TROVER.

[Mr. Owsley for Plaintiffs : Mr. Turner for Defendant.]

FROM THE CIRCUIT COURT FOR MADISON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court. October 7.

FORT sued **Estill** and wife, in **Trover**, for a slave named **Dick** ; and the circuit court having granted a new trial, on the ground that, in the opinion of that court, the evidence was insufficient to sustain the first verdict against the wife, another verdict was rendered, at a subsequent term, against both husband and wife, for five hundred seventy one dollars forty eight cents, in damages ; for which, the court, after overruling a motion for another new trial, gave judgment: to reverse which, this writ of error is prosecuted.

Statement of the
case.

The counsel for the plaintiffs urges four principal grounds for reversing the judgment :—*first*, that the declaration, containing two counts, one for a conversion by the husband and wife, the second for a conver-

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sion by the wife alone, is insufficient, because, as the counsel insists, there cannot be a joint conversion by the husband and the wife; and, therefore, as, in that view, the first count sets out a cause of action against the husband alone, it could not be properly joined with the other count, containing a cause of action against the husband and wife jointly; *second*, that the circuit judge erred in rejecting evidence; *third*, that he also erred in instructing the jury; and, *fourth*, that the evidence did not authorize the verdict.

The counsel for the defendant in error endeavors, of course, to maintain the converse of all these propositions; and also insists, that no error in the judgment should be available to the plaintiffs, because, as he argues, the circuit court erred in setting aside the first verdict.

Each of the points, thus presented, will be briefly considered, in the order in which they have been stated.

Husband & wife
may be jointly
guilty of a tort,
trespass, or tortious
conversion of
a chattel.

I. The first position assumed by the counsel for the plaintiffs, may be made quite imposing by argument, and by respectable *dicta* of learned judges. But the weight of authority preponderates decidedly against it. It is indisputable, that the wife may, in conjunction with her husband, be guilty of a tort or trespass; and it would seem to be fairly inferrible by analogy, and to be well settled by authority, that they may be jointly guilty of a tortious conversion of a chattel.

A conversion by a wife, is a conversion to the husband's use: and he only can be sued for it. Where the conversion was by both jointly, he alone, or both jointly, may be sued. If they are joined, the dec'n must allege that the conversion was (not to their, but) to his use.

If the conversion be, in fact, by the wife alone, it is deemed a conversion to the use of the husband only, and should be so declared on. So, if the conversion, in fact, be, *as it may be*, the joint act of both husband and wife, it is deemed in law the husband's act; and consequently, he may be sued alone. 2 *Saunders' Rep. Note*, 47, h. But it is conclusively settled by adjudged cases of controlling authority, that, in this latter class of cases also, the wife may be sued jointly with her husband; though in this, as in the former class, the declaration should charge the conversion to have been to the use of the husband, and not *ad usum ipsorum*. 2 *Saunders, supra*, and the authorities there cited.

Com. Dig. title Baron and Feme Y., 1st Am. Ed. 234. Ib. title Pleader, 2 A. 2, 297. 1 Sel. N. P. 220.

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In this case, the declaration charges the conversion to have been the joint act of Estill and wife, *to his use*; and consequently, that count must, upon authority, be deemed good, and such as may be properly joined with the second count, charging a conversion by the wife alone. Whether the second count, charging the conversion to the use of husband and wife, should have been deemed good after verdict, had there been no other count, we need not intimate, because, as the first count is sufficient, and the verdict is general, the insufficiency of the other count is immaterial.

A count, in trover, charging a conversion by husband & wife, to his use, and one charging a conversion by the wife alone, may be joined. If there be one count good, in trover, (though the others may be bad,) it will sustain a general verdict.

II. After it had been agreed between the parties, that the slave had been "*taken*" from the defendant, "*at the instance*" of the plaintiffs, and that they, "*about the same time, got possession*" of him, and "*continued to hold possession, exercising acts of ownership over him,*" they offered to prove that, whilst Mrs. Estill was in Kentucky, her husband having in some way obtained possession of the slave in South Carolina, where the defendant lived, brought him to this state. But the circuit judge, deeming such facts inadmissible, refused to permit the proof of them. In this, we think, there was error. *First:* the rejected facts are not inconsistent with the agreed facts; for although, as admitted and agreed, the slave may have been taken from the defendant, at the "*instance*" of the plaintiffs, nevertheless, it may also be a fact, that he was, in the absence of both Estill and his wife, taken by a stranger, at *their* joint request, afterwards delivered to Estill, and, by him, brought home to Kentucky, without the personal cooperation of his wife. *Second:* the rejected facts were relevant, and might have been important. Though the general fact, that the slave had been taken at "*the instance*" of the plaintiffs, rather imports that he was taken without the personal presence or cooperation of either the husband or the wife, yet the language used in the agreed case is somewhat indeterminate, and the rejected evidence would have tended to render certain that which might otherwise be uncertain and unsatisfactory; and that ev-

Facts agreed—that a slave was taken from the plaintiff in trover, "*at the instance*" of the def'ts—a husband and wife, who "*about that time received, and continued to hold, possession of the slave, exercising acts of ownership over him.*" Defendants offered to prove, that the husband, while his wife was in Ken., obtained possession of the slave in S. C. and bro't him home: held that this evidence was erroneously rejected,—as it conduced to show, that the conversion was by the husband alone, and also tended to illustrate the agreed case.

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A *feme covert* is not legally liable for consenting to, or advising, a wrong: she cannot be a trespasser by construction.

idence might have been material, for it would have tended to prove, that the conversion was by the husband alone, and that the wife was not guilty.

A *feme covert*, though she may be liable for a tort actually committed by her in person, cannot be held responsible for advising a wrong, or assenting to it, either before or after its perpetration by another. 1 *Chitty on Pleading*, 65, and the authorities there cited. She cannot be made a trespasser by construction, as a person *sui juris* may and should be deemed, in consequence of the exercise of a voluntary judgment or will. 1 *Chitty*, 67, 81. *Co. Lit.* 180, b. n. 4, 387, b. Now, according to this doctrine, it would have appeared, had the rejected testimony been received, that the husband, and not the wife, was guilty of the conversion in South Carolina. And after he had converted the slave and brought him home, surely she should not be deemed guilty of another conversion by exercising, with him, the dominion of a wife over a slave in the possession of her husband, and claimed by him as his own.

Instructions, to find for plff. upon the agreed case above stated, held erroneous.

III. The circuit judge instructed the jury, peremptorily, that the facts agreed entitled the defendant in error to a judgment against the plaintiffs: and this was also erroneous. For, even if the facts agreed did not necessarily imply, that the wife had no personal agency in the taking, a jury might have deduced such an inference from them, and consequently, have inferred that she had only advised or assented to it; and, therefore, was not, in law, guilty.

IV. It is a necessary consequence of the foregoing view, that the circuit court erred in overruling the motion for a new trial. And, for the like reasons, there was no error in setting aside the first verdict; because, not only were the agreed facts the same on both trials, but on the first, the facts rejected on the last were proved, and left no ground for sustaining the verdict against the wife.

Judgment reversed, and cause remanded for a new trial.

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Scotts vs. Lindsay et al.

DEBT.

[Mr. G. Davis for Plaintiffs: Mr. Hanson for Defendants.]

FROM THE CIRCUIT COURT FOR BOURBON COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

October 7.

THE plaintiffs being entitled to a monied legacy in the hands of an executor residing at New Orleans, it was paid over by him to an agent appointed by them to receive it.

On the return of the agent to this state, the defendants filed a bill against him and the executor, setting up a demand against the testator of the executor, alleging the money in the hands of the agent to be the property of the executor, as such; claiming to have their demand satisfied out of it; praying for, and obtaining an injunction and restraining order against the agent, from "paying over or putting out of his hands" so much of the money as would be sufficient to pay them, until their case could be heard.

The plaintiffs were no parties to this proceeding, but caused themselves to be brought before the court; and, at their instance, the injunction was dissolved, and the bill dismissed. They then brought this suit, charging, in addition to the foregoing facts, that, pending the injunction, the agent became insolvent, and removed from this state, whereby they were unable to collect from him the sum enjoined by the defendants.

If the proceeding in chancery be considered as a mere garnisheeing of an alleged debt due from the agent to the executor, the plaintiffs have no cause of action; for, as the agent was not indebted to the executor, no payment over to the plaintiffs, of the money belonging to them, would have violated the injunction, nor could its pen-

Legatees appoint an agent, who receives their legacies from a foreign executor. Creditors of the testator attempt to attach the fund in the hands of the agent, by a proceeding in chancery, with injunction restraining him 'from paying over the money, or putting it out of his hands.'—The injunction being dissolved, at the instance of the legatees, and the agent having, in the mean time, left the state, insolvent, they sue the attaching creditors, for the injury resulting from the injunction. — Held, that, as the agent was not a debtor of the ex'or, nor garnishee, & could not avail himself of the injunction to resist paying over to his principals (though he might have en-

joined them, giving security, and compelled them to interplead with the creditors, they were not prevented from coercing payment from him; and had, therefore, no cause of action against the attaching creditors.

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dency have been plead in bar or abatement of a suit by them against him.

But assuming, that the proceeding was, as contended, against the specific money, in his hands, as bailee for the plaintiffs, its pendency could not have been plead in abatement of their action against him, if they had brought one; and though the chancellor might, at his instance, have enjoined them from proceeding and compelled them to interplead with the defendants, yet, this would only have been done upon his giving the plaintiffs an indemnity against the effects of the delay.

So that, in either aspect of the case, the plaintiffs were not obstructed by the defendants from the pursuit of their remedy against the agent, and of course they can have no cause of action against the defendants.

Judgment affirmed, with costs.

INDICTMENT.

The Commonwealth vs. McChord et al.

[Atto. Gen. Morehead for Plaintiff: Mr. Turner for Defendants.]

FROM THE CIRCUIT COURT FOR MADISON COUNTY.

October 8.

Chief Justice ROBERTSON delivered the Opinion of the Court.

Indictment, for obstructing a road; evidence, instructions, & judg't for defts in the circuit court; & points made here.

ON the trial of an indictment against William D. McChord, Silas Tribble and John Summers, for obstructing a highway, the Commonwealth having proved that each of them, owning separate parcels of land on the road, had extended his fence upon it, each in a different place, but all within the boundary designated in the indictment,—the circuit court, being of the opinion that the defendants were jointly, and not severally, charged, instructed the jury to find “*as in case of a nonsuit* ;” on the ground, that there was a fatal variance between the indictment and the proof. The jury having accordingly found the defendants not guilty, judgment was rendered in their favor.

The correctness of that judgment is now to be considered.

The counsel for the defendants insists that the indictment is insufficient:—first, because, if it import, as he contends that it does, a joint offence, it should have charged expressly that the defendants “jointly,” and not, as it does, that “*they and each of them*,” committed the illegal act; and, second, because, if it was intended to make a several charge, the omission of the technical word “*severally*,” is fatal; and he argues therefore, that, as the indictment is substantially defective, the judgment should be affirmed, even though the court below may have erred in giving the instruction.

On the other hand, the Attorney General, without noticing the argument respecting the indictment, contends, that if the conclusiveness of the objections urged against it be conceded, still the circuit judge erred in directing a nonsuit, and that this error should produce a reversal; because, as he argues, the judgment on the verdict will bar any other indictment, either joint or several, for the same offences.

For a joint offence by several, the offenders may be indicted either jointly, or severally. But if the offenders be severally guilty of different and distinct offences, a joint indictment cannot be maintained. Whether offences be joint, or several, may be determined by ascertaining whether each offender be guilty, in some degree, of the same crime, so that he might be separately convicted, even though another was the *actual* perpetrator. If each may be so convicted, their guilt is joint; but otherwise it is several.

According to this test, the offences proved in this case, are several, and not joint.

But, for such offences—all being of the same kind, admitting of the same plea and the *like* judgment, and being subject to the same punishment in *kind*, even though in different degrees,—one indictment, charging the offenders *severally*, may be maintained against

guilt, and of punishment, one indictment charging divers offenders *severally*, may be maintained.

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al.

Different persons guilty of a joint offence, may be indicted jointly, or severally.

A joint indictment against several, for distinct offences, will not lie.

If one can be indicted alone, for an offence in which he participated with others, the offence is the joint act of all: otherwise it is several. *Ind*

For misdemeanors of the same kind, differing only in the degree of

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The strictness of old times, is not now required in indictments for misdemeanors and minor offences. The omission of terms merely technical is not material.

all of them. *First Amer. Ed. of Com. Dig. title Indictment F., and the notes by the Editor.* 1 Chitty's Crim. Law, 270-1.

It is said in the books, as argued by the counsel for the defendants, that an indictment against separate offenders should charge the offences to have been committed "*seperaliter*," unless there be a separate count for each distinct offence. But the verbal exactness and technical strictness of old times are not now required, especially in indictments for misdemeanors and other minor offences. Common sense is now the common law in such cases, as well as in those which are purely civil.

If, in this case, the indictment plainly import, according to the common sense construction; a several charge against each defendant, then it should be deemed as several, as if each defendant had been charged in a separate count, and the omission of the word "*severally*" or "*separately*" should not be fatal or material.

A judgment acquitting several def'ts, charged with committing an offence jointly, will not bar prosecutions against each one charged with part of the same offence separately committed by him.

But we cannot decide, that the charge in the indictment is several. On the contrary, though there may, we admit, be room for some doubt as to the true import of the count, in that particular, we are inclined to interpret the whole of it together, as charging the defendants with being jointly guilty of erecting three several obstructions on the road—one on the land of each of them.

And therefore, as the verdict, and judgment upon it, will not bar a several prosecution, the judgment must be affirmed.

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1834.

Yoder's Heirs vs. Easley.

TRAVERSE,

[Mess. Wickliffe & Wooley for Appellants : Mr. Richardson for Appellee.]

FROM THE CIRCUIT COURT FOR SPENCER COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

October 8.

YODER, in his life time, leased a tenement to Lawson, to hold until the 1st of March, 1832. In the fall of 1831, Lawson sold his crop and the residue of his term to Rogersson, and moved. Rogersson put fodder in the house, and shut it up. He went to see Yoder, and informed him of the contract with Lawson, and that he Rogersson was to pay the rent ; to all which Yoder assented. Upon Rogersson's return, he found his fodder thrown out of the house, and Easley with a bed in it, claiming possession of the premises as his own.

Yoder died on the 7th of April, 1832. On the 10th of April, 1833, his heirs sued out a warrant of forcible entry and detainer against Easley. The jury found against them, and they traversed the inquisition. Upon the trial of the traverse, the circuit court instructed the jury, on the foregoing facts, to find for Easley.

The heirs of Yoder are entitled to the remedy, provided he would have had it, were he now living. *Turly vs. Foster et ux.* 2 Marsh. 204. The question therefore is, whether a landlord can maintain a warrant of forcible entry and detainer against the disseizor of his tenant, after the expiration of the lease.

Two years did not run, from the entry of Easley, previous to the suing the warrant. Consequently, he is not protected by the limitation provided in the 15th section of the act regulating proceedings in cases of forcible entry and detainer.

In the cases of *Pogue vs. McKee*, 3 Marsh. 128, and *Prewitt vs. Durham's Executors*, 5 Mon. 18, it was decided, that this remedy, for forcible entries, was given by

Wherever the ancestor could have had a writ of forcible entry and detainer, the heirs have the same remedy.

The remedy by writ of forcible entry and detainer, is given "to him only who, at the time of the entry, had possession in fact." If a tenant, or subtenant, is disseized, he, and not the landlord, has this remedy. The landlord must look to his immediate tenant, with his contract for a restoration of the possession, for redress.

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the statute, "to him alone who at the time of the entry had the possession in fact." As the possession in fact was in Yoder's tenant, or subtenant, at the time of Easley's entry, and as the lease had not then expired, there can be no doubt of the right of the tenant or subtenant to maintain the warrant for a forcible entry. If Yoder may likewise sue after the lease expires, and when the tenant has not sued, during the continuance of the lease, it can only be by substituting Yoder for his tenant, and considering the possession in fact of the tenant, as the possession in fact of Yoder. We were inclined to give the landlord, after the expiration of the lease, all the remedy under the statute, which his tenant might have used to regain the possession from a disseizor, and to think the substitution of the landlord to the tenants right of action in such case, might be sustained by analogy to the doctrine which substitutes the heir and confers on him all the rights of the ancestor; but on mature reflection, we are constrained to give up first impressions. The forcible entry on the possession in fact of a tenant, is a personal wrong, a *tort*, done to him alone. He is responsible to his landlord, upon the contract which he may make for the restoration of possession at the termination of the lease, and the landlord must look to that responsibility, instead of instituting suits in his own name, for wrongs done the tenant. The rights of the tenant to sue do not descend on the landlord, upon the termination of the lease, in the same manner which the rights of ancestors do, in many cases, upon their heirs. It would be establishing a new principle to transfer the tenant's right, to his landlord. The powers of legislation are not ours.

Those provisions of the statute, which afford remedy against tenants holding over, do not apply between the landlord and the disseizor of his tenant.

The instruction of the court was correct. Wherefore the judgment is affirmed, with costs.

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1834.

Davis' Heirs *against* Bentley.

CHANCERY.

[Mr. M. D. McHenry for Plaintiffs: Mr. Turner for Defendant.]

FROM THE CIRCUIT COURT FOR WASHINGTON COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

October 8.

BENTLEY obtained a decree against the heirs of Davis, by taking the bill for confessed, upon an order of publication.

After the decree, which was rendered in May, 1831, had been executed by the sale of a tract of land, and report made to court, Thomas Davis, one of the heirs, and Elizabeth Davis, the widow of the deceased, who claimed as assignees the amount of two judgments which were perpetually enjoined, petitioned the court to open the decree, and to permit them to file their answers. Upon consideration the court made the following order:—"It is ordered, that the decree be and the same is hereby opened;" and thereupon the said Thomas Davis and Elizabeth Davis, by leave of court, filed their joint answer in the nature of a cross bill, against the complainant and the heirs of James Davis, deceased.

The litigation growing out of the answer and cross bill, thus filed, is still pending and undetermined.

Davis' heirs, who are numerous, have, notwithstanding the above order, sued out a writ of error, and ask for a reversal of the decree against them. It is now contended, that there is no subsisting decree against them; that there is nothing to reverse, and consequently, that the writ of error should be quashed. We cannot allow the argument to prevail. The order, letting in the answer and cross bill, does not purport to set aside the decree; and even if it did, being made at a subsequent term, it could not have that effect. The decree could only be regularly set aside, by sentence of the court, after the parties had been fully heard upon

A decree rendered upon constructive service of process, remains in force—although the defendants may have obtained an order to open it, filed answers &c.—until it is *set aside* by sentence of the court, *after the hearing* upon the matter of the answers;—and the pendency of a suit upon the answers so filed, cross bills &c. will not prevent the prosecution of a writ of error, and reversal of the decree.

Where there is a decree against several absent joint defendants, which they may open, or reverse—one cannot, by obtaining an order to open the decree and filing his separate answer, affect the right of the whole to their writ of error.

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the matter brought forward in the answers. *Dunlap's heirs &c. vs. McIlvoy &c.* 3 Litt. 271. We, therefore, look upon the decree as still subsisting.

We are furthermore of opinion, that the decree, as rendered, operates upon the heirs of Davis in their joint or coparcenary character, and that it was not competent for one of the heirs, by filing a separate answer, to open the decree, so as to prevent the prosecution of a writ of error by the whole jointly. Thomas Davis, who has answered, does not appear to have such a separate and entire interest in the subject of controversy, as will bring him within the exception mentioned in *Bleight &c. vs. McIlvoy &c.* 4 Mon. 145.

We shall proceed to look into the merits of the decree. The slightest glance is enough to shew its impropriety. Without commenting on its errors, it is sufficient to say, that it must be reversed, because it decrees *in personam* against the heirs, large sums of money, without respect to the assets descended, or their value, and when there is nothing to shew the value and extent of assets descended. It was error to proceed against the heirs, without making the personal representative a party. The decree is reversed, with costs, and cause remanded for proceedings not inconsistent herewith.

DEBT.

Keas et al. vs. Yewell.

[Mr. Crittenden for Plaintiffs: Mr. Owsley for Defendant.]

FROM THE CIRCUIT COURT FOR OLDHAM COUNTY.

October 8. Judge NICHOLAS delivered the Opinion of the Court.

Where the condition of a penal bond, or the effect of a covenant, is, that the obligor, or covenantor, shall

SIMEON YEWELL filed his bill in chancery against Keas, to foreclose a mortgage on two slaves; and upon an alleged apprehension, that they would be carried out of the state, obtained an order requiring the surrender of their possession, unless Keas should give surety for their

forthcoming to answer the decree of the court. Under this order, Keas gave bond, with surety, conditioned to have the slaves forthcoming, to answer any decree that may be rendered in said case.

Under the final decree, one of the slaves was produced and sold, but the other not being forthcoming, this suit was brought by Yewell, on the bond against Keas and his sureties; and he having obtained verdict and judgment against them, they prosecute this writ of error.

The defendants filed three special pleas; demurrers to which were sustained. But they need not be particularly noticed, as they were waived by the filing of another plea, which was also demurred to, and the demurrer sustained. This plea states, in substance, that, notwithstanding the utmost care and diligence of Keas, the slave had run away from him, between the execution of the bond and the rendition of the decree, and notwithstanding the utmost diligence had been used by him, he was unable to reclaim her, and therefore, she had not been forthcoming to answer the decree.

Tested by the literal import of the covenant, there could be little dispute that this plea furnishes no sufficient excuse for not having the slave to surrender in obedience to the decree. Her running away was not guarded against by any stipulation in the covenant, nor is it, properly speaking, that description of casualty which could be termed inevitable, so as to relieve the parties from the effect of their covenant by the principles of the common law. But still, in our estimation, it constitutes a valid defence to the action. The covenant must be treated and construed, with an eye to the subject matter about which it was entered into. The apprehension and the complaint of Yewell was, that Keas would remove the slave from the state before he could, by decree, subject her to the satisfaction of his demand. He made no complaint that the slave would run away, or that there was any danger of her absconding, unless she was placed under restraints such as masters do not ordinarily subject their slaves to. The purpose of the restraining order was to secure him against

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restore or deliver a certain slave, at a specified time,—& after the execution of the writing, and before the time for the restoration or delivery of the slave, he runs away, or dies, and the obligor, or covenantor, cannot recover him, by proper efforts and diligence, he shall be excused from performance;—and no action can be maintained against him for this breach.

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the acts of Keas, and not of the slave herself. The order required Keas to give bond with security for her forthcoming, or that the sheriff should take her and deliver her into the possession of Yewell. Suppose that Yewell had thus become possessed of her, and without any fault on his part, the slave had absconded from him, so as not to be retaken: would he have been responsible to Keas for her value? We conceive not. He would only have been responsible for reasonable diligence in taking care of her. If this be so, and he would have incurred no responsibility by reason of his having taken her into his possession, it would seem to be peculiarly rigorous if the law were to visit such responsibility on the sureties of Keas, for a like casualty.

The casualty by which the slave was lost, is a peril incident to the very nature of such property; and therefore in contracts or covenants concerning such property, that peril should never be presumed to have been intended to be guarded against, unless so expressly stipulated. It has accordingly been held by the court of appeals of Virginia, and by this court, that the hirer of a slave was excused, by the fact of the slave having run away without his fault—from his covenant to return the slave at the end of the year. *Singleton vs. Carroll*, 6 J. J. Mar. 528. The covenant of the hirer in that case, was as express, unambiguous and unconditional, as that of the parties here. The same principle that exempted the hirer from responsibility there, must relieve the obligors in this bond, also. The principle is, as laid down in that case, that the loss is not to be considered as provided against by a general covenant, and its happening, therefore, presents the same excuse for non-performance, that the death of the slave would have done. We therefore think the court erred in sustaining the demurrer to this plea.

We find no other question in the record, which the decision upon this plea, will not meet and point out on the return of the cause; nor do any of the various alleged errors need particular notice. It may be well,

Where a mortgagor, in obedience to an order of court, gives bond to have the mortgaged property forthcoming, to answer the decree—(page 248-9)—the measure of damages, in an action on the bond, is the amount of the decree, if that is less than the value of the property; otherwise, the value of the property.

however, on another trial, for the court to qualify the instruction it gave to the jury, that the measure of recovery was the value of the slave, with a proviso, that the value does not exceed the balance of the mortgage debt and costs of the chancery suit. The court ought also to permit the plaintiff to amend his declaration, by inserting *Simeon*, instead of *Jeremiah*, as was asked by him.

Judgment reversed, with costs, and cause remanded for further proceedings consistent herewith.

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1834.

Hughes &c.
vs.
Smith.

Hughes and Others *against* Smith.

CHANCERY.

[Messrs. Wickliffe and Wooley for Plaintiffs: Mr. Haggin for Defendant.]

FROM THE CIRCUIT COURT FOR SCOTT COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

October 9.

It was determined when this cause was before this court heretofore, that the complainants, now plaintiffs in error, were not bound to accept the bank stock, which Smith as their guardian had purchased for them. See the opinion delivered 19th April, 1832, 7 J. J. Mar. 238.

Wards are not bound to take Bank stock, in which their guardian invested their funds, and which afterwards sunk in value. He must account to them for the money invested, with interest. 7 J. J. M. 238.

Upon the return of the case, the circuit court decreed in conformity to the opinion of this court, as it declared; but the complainants, being still dissatisfied, have again prosecuted a writ of error; and now assign for error, that the decree does not give them as much as they are entitled to.

Two objections are urged against the decree. *First.* It is contended, that the guardian, Smith, should have been required to abide by a statement of the accounts

Guardians are required to settle their accounts annually; and to keep their wards' mo-

ney out at interest, upon security approved by the county court—the interest to be collected, and added to the principal, annually. For failing to comply with these requisitions, they are liable.—But if a guardian cannot let the money, or cannot collect the interest, he will be excused; and held accountable for interest so far only as he receives it.—If he uses the money himself, he will be held accountable for the *compound interest*.

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annually; and that he should be charged with interest on the balance due by him at the end of each year.

The statute regulating the duties of guardians, requires them to settle their accounts annually, and likewise to keep the money of their wards out at interest, upon such security as the county court shall approve.

If the guardian cannot let the money at interest, as provided for by the statute, he is not responsible for interest, unless he uses the money. If he makes use of the money he is bound to pay interest, and the interest which accrues annually, should become principal in his hands, and bear interest for the ensuing year; and this rule should be applied so long as he uses the money.

When a guardian puts out money at interest for his wards, it is his duty to collect the interest annually, so that it may become a new principal; but if he cannot do this, so as to convert it into a new principal precisely at the end of the year, he is not answerable for the want of punctuality in the debtor; and in such case, the interest only becomes a new principal from the time it is put out at interest, or from the time the guardian uses it, after it shall have been collected. If the guardian, in bad faith, fails to observe the foregoing rules he may be rendered responsible for the want of fidelity in the discharge of his duty.

Now Smith did not use the money of his wards for his own purposes. It is clear that he laid it out, in good faith, in the purchase of stock for their benefit. This stock, being depreciated, has, by the decision of this court, fallen upon Smith, and he is required to account with his wards for the money originally received. We think interest ought not, under the circumstances, to be compounded against him. His laying out the money, in good faith, for bank stock, is like putting the money into the hands of an individual at interest. It deprived Smith of its use. The interest, or dividends, which he received from the bank, was a fund which, on the foregoing principles, he ought to have put out at interest; and in order to escape the payment of interest thereon, annually compounded, he should have shewn an effort to comply with the provisions of the statute regulating his

A guardian who invested funds of his wards in Bank stock, in good faith, for their benefit, & received the dividends in depreciated paper, was held accountable for their money, with interest—to his loss. Under these circumstances, the interest shall not be compounded upon him.

duty as guardian, and an inability to make a safe investment under the sanction of the county court. Such would be the ordinary case of receiving interest by the guardian upon money due the ward. But here the greater part of the dividends was paid in notes on the Bank of the Commonwealth, greatly depreciated. Consequently, Smith did not, in point of fact, receive more than the value of the notes in which the dividends were paid. We cannot count those notes as equivalent to specie, for the purpose of compounding interest on the guardian, to the full extent of their nominal amount. As the wards will not adopt the acts of the guardian intended for their benefit, we shall put them entirely out of view, except so far as they shew that the guardian did not use the money of his wards for his own benefit. That being the case, we think the requisitions of the statute are satisfied by requiring Smith to account for interest on the principal sum originally received without compounding it. Smith will be the loser by settling the accounts according to the commissioner's report. The dividends received will not indemnify him for the interest he will be compelled to pay. The statute was not intended, under all circumstances, to give wards their principal with interest annually compounded against their guardians. We shall not disturb the decree, in order to give the complainants more interest than they will get as it stands.

It is objected in the second place, that the court has allowed Smith more for his services than he was entitled to. The sum allowed is very near, if not precisely, *five per cent.* on the whole amount which Smith has already paid, and will be required to pay, counting up to the date of the decree. It is, therefore, *five per cent.* on the amount of the estate of the wards, and may have been properly allowed without violating the case of *Campbell vs. Williams*, 3 Mon. 124.

Upon both points, the decree is affirmed, with costs.

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A guardian may be allowed, for his services, 5 per cent. on the amount he pays over to the wards.

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DEBT.

Yantis *et al.* vs. Burditt *et al.*

[Mr. Owaley and Mr. Kincaid for Plaintiffs : Mr. Cunningham for Defendants.]

FROM THE CIRCUIT COURT FOR LINCOLN COUNTY.

October 9. Judge NICHOLAS delivered the Opinion of the Court—the Chief Justice not sitting in this case.

Statement of the case, and principal point to be decided.

THIS action was brought on a replevin bond, entered into, October, 1831, under the act of January, 1830, to amend and regulate the action of replevin. The property levied on, was appraised at less than the amount of the execution under which it was seized. The plaintiff in the action of replevin having failed therein, and failed to return the property, the principal question which arose on the trial of this case against him and his sureties, was, whether they were liable for any more than the value of the property replevied, without interest or damages. This depends exclusively upon the construction to be given to the second section of said act, which is as follows :—

“That in all cases embraced by this act, in which the plaintiff in replevin shall fail successfully to prosecute his action, he and his sureties shall be liable, in an action on the bond, to the value of the property replevied, unless the property be restored : provided, that value does not exceed the amount of the execution by which said property was taken ; and if it exceeds that amount, then the amount of such execution, with interest on the value or amount, from the time said property was replevied till paid, and also, ten *per centum* on the whole of such amount or value, and all legal costs, as well of the action of replevin, as the action on said bond, and all such other costs and damages as the defendant in replevin may shew himself entitled to.”

The plaintiff in replevin (other

Though this section is very awkwardly and inartificially worded, yet we think it fairly susceptible of the

construction, given to it by the circuit court: that is, that when the plaintiff in replevin fails in his action, he and his sureties shall be liable for the value of the property replevied, with interest till payment, together with ten *per cent.* on the value, provided, such value did not exceed the amount of the execution. It is very difficult to suppose even a plausible reason, why the legislature should subject the plaintiff in replevin to interest and damages on the whole amount of the execution, when the property replevied was of greater value, and not subject him to interest and damages on the value of the property, where the value was less than the amount of the execution. In the absence of all reason for any such distinction, we cannot presume it to have been intentionally made, and all legitimate aid must be lent by construction, to the language used, in order to prevent it. The mere collocation of words is ordinarily a very unsafe and unsatisfactory test of legislative meaning. If such words are used, as by proper collocation, will give a reasonable and practical expression of legislative intention, it is the duty of the court so to transpose the words, as to rescue the legislature from the imputation of a palpable absurdity. A slight transposition of the words of this section, will render it both intelligible and accurate. But, in fact, if left as they now stand, it is impossible to give any other than the construction given by the circuit court, unless we were unwarrantably to reject the word *value*, as of no signification whatever, as twice used in the following fragment of the section: "with interest on the value or amount, from the time the said property was replevied until paid, and also ten *per centum* on the whole of such amount or value." The reference here to the value, must be necessarily to it, when less than the amount of the execution; for the previous part of the section expressly declares, the plaintiff in replevin shall not be liable for the value where it exceeds the amount of the execution, and the legislature cannot be supposed to intend to regulate the damages and interest on a sum for which he was not liable.

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than between tenant and landlord,) failing in his action, he and his sureties are liable on their bond (taken under the act of 1830,) for the value of the goods replevied, where the value is less than the amount of the ex' on, with interest, and ten *pr. ct.* on the value of the goods, as damages.

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The damages given, by the act of 1830, against the pltf. in replevin who fails in his action, are *ten per cent.* on the value of the goods replevied, if that is less than the amount of the ex'ou; and on the amount of the ex'ou where the value of the goods exceed it — *without regard to time.*

The interest given by the same act, is to be computed from the time when the writ of replevin was executed, not from its date.

The plaintiff in replevin (under the act of 1830) failing in his action, is liable to the deft., for the reasonable amount of fees, above the taxed fee, which he has to pay to his attorney for services required in consequence of the replevin.

The circuit court refused to instruct the jury, that the plaintiff in this suit could not recover more than the value of the property levied on, if that value was less than the amount of the execution; and instructed them, "that the plaintiff had a right to recover the value of said property with *ten per cent.* thereon, and legal interest from the time of suing out the replevin, and the costs of the replevin suit." Conceding the court was right in refusing the instruction asked, still it is contended for the plaintiffs in error, that it erred in its instruction as given, because it means, that *ten per cent. per annum*, was to be computed from the time of suing out the replevin, and because that was not the true time from which to compute either the damages or the interest, but, as the act directs, from the time the property was replevied. The latter objection would, no doubt, be a substantial one, provided it created a substantial difference in the finding, to the prejudice of the plaintiffs in error. But this it could not have done, for the writ was sued out on one day and the property replevied on the next, so that the difference would be only one day's interest, which would be too small to authorize us to disturb the verdict, even if that day's interest had been included in the assessment, which it was not, from any calculation we can make. The other objection to the instruction rests upon a misconstruction of it, of which it is manifest the jury were not guilty. We think the instruction only imports that a single *ten per cent.* was to be allowed, and that it was the interest alone which was to be computed from the time mentioned.

The court permitted the defendant to prove to the jury, that he had paid thirty-five dollars as fees to his attorneys in the action of replevin, which was proved to be a reasonable compensation, and that sum probably constituted part of the finding. Does the act authorize the recovery of the fees so paid? It declares the plaintiff in replevin liable for "all legal costs, as well of the action of replevin, as the action on said bond, and all such other costs and damages as the defendant in replevin may shew himself entitled to." This language is

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certainly not as definite and explicit as could have been desired, but we do not perceive how we are to give any effect to the words, "such other costs and damages as he may shew himself entitled to," unless they are construed to mean, all such costs, over and above the legal costs of the replevin suit, as he was necessarily subjected to by reason of the suing forth and executing the writ of replevin. Neither is there any kind of cost, which the defendant would be thereby made to incur, that would fall more naturally within such a description, than that extra compensation which he would necessarily have to pay to attorneys, for defending the suit, over and above the taxed fee. It is a cost or damage to which he was subjected, exclusively by reason of the institution of the replevin suit, and would seem, therefore, to present the strongest claim for being embraced by the legislative description, of such other costs and damages as he might shew himself entitled to, over and above the legal costs of that suit. The court therefore did not err in admitting this proof.

The court also permitted the plaintiff to give in evidence, the sheriff's fee bill, containing two items; one of half commission on the value of the property levied on, and the other for serving subpoenas on witnesses. We are aware of no law, then in force, giving the sheriff half commission, in such cases, and we do not feel at liberty to recognise his right thereto, from a mere analogy to the allowance made him in other cases, as expressly provided for by statute. The other item of the fee bill was not legitimate evidence, because it did not specify the suit in which the subpoenas were served.

For this error of the court, in permitting the fee bill to go in evidence to the jury, the judgment must be reversed with costs, and the cause remanded with instructions for a new trial.

Sheriffs were not entitled (before the act of 1831) to half commission for levying ex'ons on goods that are afterwards replevied out of their hands.

A fee bill is not evidence of costs incurred in a particular suit, where it does not specify the suit.

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CHANCERY.

Harrison against Talbot.

[Mr. Crittenden for Appellant : Mr. C. A. Wickliffe for Appellee.]

FROM THE CIRCUIT COURT FOR NELSON COUNTY.

October 10.

Chief Justice ROBERTSON delivered the Opinion of the Court.

Sale of a tract of land, described in a covenant for a conveyance, by its boundaries, and as containing 400 acres, for \$6000, full consideration.

IN March, 1829, Burr Harrison sold and covenanted to convey to Daniel Talbot, "*all that tract or parcel of land,*" near Bardstown, "*on which Col. Andrew Hynes died,*" describing it by its boundary, and designating it as containing four hundred acres; and Talbot covenanted to pay six thousand dollars, "*for and in full consideration for the absolute purchase of the said tract or parcel of land.*"

Alfred W. Hynes, to whom the tract had been devised by Andrew Hynes, his father and the father-in-law of Harrison, also covenanted to unite in the conveyance of the legal title to Talbot.

There are 490 acres—and the vendee files his bill for a conveyance of the whole for the six thousand dollars. The vendor insists, that the sale was, in fact, by the acre, at \$15, the parties being under mistakes as to the quantity, which, from a family tradition, had been called 400 acres; and that he had a right to retain the surplus, unless he was paid for it.

Having ascertained, by actual survey, after he was put into the possession of the land, that the boundary contains four hundred and ninety acres, Talbot filed a bill in chancery, to coerce a conveyance for the entire tract, for the stipulated price—six thousand dollars. Harrison insisted, that the sale was, in fact, not by the tract in gross, but by the acre, at fifteen dollars an acre; that, from a family tradition, the tract had been called one of four hundred acres, and was, as a matter of course, estimated in the contract, as of that quantity, or thereabouts. He therefore resisted the prayer for a decree for the whole four hundred and ninety acres, at the price of six thousand dollars; but proposed to make a title, either to four hundred acres for the six thousand dollars, or to the four hundred and ninety acres for a proportionate consideration.

Circuit court decrees a conveyance of the 490 acres, for \$6000

After sundry depositions had been taken, to prove various extraneous facts on each side, the circuit court decreed a specific execution of the contract for the entire tract of four hundred and ninety acres, upon full

payment of the stipulated consideration of six thousand dollars.

That decree is now called in question, by this appeal.

The terms of the written memorial import, according to the established construction, a sale *in gross*; and the canons of interpretation are the same and should have an equal effect in every forum. Wherefore, as there is no proof of fraud, or mistake, in the reduction of the agreement to writing, or of any subsequent waiver or modification of the technical import of that contract, and as, without some such proof, parol testimony is inadmissible in equity, as well as at law, for contradicting or explaining the legal effect of written evidence, we shall consider the contract in this case as a sale of a tract of land supposed to contain four hundred acres more or less.

Thus considering the contract, what is the decision of conscience and of established principles of equity?

Adjudged cases will, we think, when properly collated and scrutinized, furnish a clue for a satisfactory solution.

In the case of "*Quesnal vs. Woodlief et al.*" decided by the Court of Appeals of Virginia, in 1796, and which may be found in a note to the 2 vol. of *Henning and Munford*, page 173,—Woodlief having, for a stipulated sum, sold to Quesnal a tract of land described as containing eight hundred acres, and afterwards, without an actual survey, made a deed for that quantity, "*more or less*;" but Quesnal having afterwards ascertained, that the boundary contained only *six hundred and eight acres, one rood and thirteen perches*, the court decided that he should be exonerated from paying for the deficiency in the estimated quantity, "*that deficiency being (in the language of the opinion rendered) too great for a purchaser to lose under an agreement for a reputed quantity, notwithstanding the words 'more or less' inserted in the deed, which should be restricted to a reasonable or usual allowance for small errors in surveys and for variation in instruments.*"

The same court decided, in "*Nelson vs. Matthews*," 2 *Henning and Munford*, 164, that, as Matthews had sold and conveyed, *in gross*, to Nelson, a tract of land represented to contain five hundred and seventy two acres,

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In the absence of proof of fraud, or of mistake in drawing a contract, or subsequent modification of its technical import—a written contract must have the same effect in chancery, as at law—parol testimony, to change its effect, being inadmissible.

The main question in this case.

In Va. it has been decided, that, where a very great difference (33 per cent.) has been discovered, between the actual, and the estimated, quantity of land sold in the gross, the contract may be presumed to have been founded on a gross mistake as to quantity, and the injured party may have relief in chancery. And, also, that where the difference is not greater than a purchaser in gross might have anticipated, there can be no relief.

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and two smaller adjoining tracts described as containing altogether two hundred acres, and the larger tract containing in fact only five hundred and forty four acres, had been conveyed to Nelson as containing five hundred and fifty two acres, and, as one of the small tracts, of forty one acres, was entirely lost, and the other, estimated at one hundred and fifty nine acres, was covered, to the extent of fifty one acres, by the larger tract,—Nelson should have a deduction from the stipulated price for the amount of the average value of forty one acres, and fifty one acres, and also of twenty acres, the difference between the quantity of the large tract, as described in the deed to Matthews, and as described in the deed from him to Nelson; but the actual deficiency being twenty eight acres, nothing was allowed for the residual eight acres, because, in the language of the court, “*such deficiency (was) not more than a purchaser in gross might reasonably expect.*”

In that case, it is evident that the deduction for the twenty acres, was allowed on the ground that, as Matthews had represented to Nelson, that the large tract contained that much more than the deed to himself for the same tract described, he should be presumed guilty, to that extent, of a fraud; and as relief was not given to the extent of the difference between the actual quantity—five hundred and forty four acres, and that described in the deed to Nelson—five hundred and seventy two acres, we may infer that a deficiency of twenty eight acres in a tract supposed to contain five hundred and seventy two acres, was not deemed sufficient to justify relief on the ground of *mistake*. But it is equally, and even more clear, that in the opinion of that court, a deficit of thirty three per cent. should, *per se*, entitle to relief, on the ground of gross and palpable mistake, because such a deficit was the only expressed ground for granting relief as to one of the smaller tracts.

Review of the
various Ken-
tucky decisions
upon alleged
mistakes in the
quantity of land
sold. — Result.

In *Young vs. Craig*, 2 *Bibb*, 270, compensation was sought by Craig, for fifty six acres of surplus beyond the estimated quantity in a tract of land which he had conveyed to Young as containing four hundred and twenty five acres, “*be the same more or less.*” But relief

was denied by this court, on the ground that, in such a case, such an excess was deemed insufficient to entitle the vendor to relief.

As that is a leading case, and as the opinion, like every other delivered by that eminent jurist, the late *Chief Justice Boyle*, is distinguished by a peculiar precision and perspicuity, the following brief extracts will not be deemed superfluous.

"There is no novelty or peculiarity in the principles upon which questions of this sort depend. In contracts of this kind, the same good faith is required and the same responsibility attaches to its violation which law and reason prescribe in every description of contract. If, through fraud or gross and palpable mistake, more or less land should be conveyed than was in the contemplation of the seller to part with, or the purchaser to receive, the injured party would be entitled to relief, in like manner as he would be for an injury produced by a similar cause in a contract of any other species."

"Contracts for the sale of land may be considered of two descriptions: *First*, where the sale is of a specific quantity, which is usually denominated a sale by the acre; and *second*, where the sale is of a specific tract, by name or description, each party risking the quantity. The latter, for the sake of brevity, is sometimes called a sale in gross."

"It is evident that, in a sale per acre, much less variation from the quantity intended to be conveyed, would afford evidence of a mistake which would justify the interposition of a court to correct it, than would be sufficient for that purpose in a sale of the other description"—"Each case must depend much upon its own particular circumstances."

The plain and most obvious meaning of the expression "*be the same more or less*" is that the parties were to run the risk of gain or loss, as there might happen to be an excess or deficiency in the estimated quantity."

"We do not mean to be understood that, in a sale of this kind, the surplus or deficit might not be so great as to authorize an inference that it had been produced by

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that, in an executed contract, where there has been a gross mistake in the quantity sold, for "more or less," the complaining party, who has practised no fraud, nor any culpable negligence, nor impaired his equity in any other way, is entitled to relief in chancery. And the condition of the injured party is still more favourable, where the opposite party comes into chancery for a specific execution—for then, he must show that he has a clear right to it, equitably and conscientiously otherwise, he will be left to his legal remedy.

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fraud or mistake ; but, in this case, where the estimated quantity was four hundred and twenty five acres, and the largest quantity which any subsequent survey has made it is four hundred and eighty one, the surplus does not appear so great as not to be within the reasonable limits of a risking bargain of this kind." And for this last position, *Sugden on Vendors*, 201, *first Am. Ed.* is referred to—where the general principle is correctly laid down, and where, also, a case is cited in which relief was refused to a purchaser of a tract estimated at one hundred acres, though the actual quantity was only sixty.

In *Fisher vs. May's heirs*, 2 *Bibb*, 451, the court decided, that a vendor, who had conveyed and received pay for a tract estimated as containing four hundred acres, in 1786, was not entitled in equity to compensation for a surplus of only twenty two acres, and concluded with the following just and reasonable remark :—"the inference of either fraud, or gross and palpable mistake, in the conveyance, is unwarranted ; twenty two acres of surplus, in the conveyance of four hundred acres in the year 1786, is believed no very unusual thing ; and were old conveyances permitted to be called in question for such cause, no doubt it would open another scene of contention about land the pernicious effect of which is almost incalculable."

In *Smith vs. Smith*, 4 *Bibb*, 81, this court decided, that it was not equitable to compel a specific execution of an agreement for the sale of a tract of a hundred and eighty nine acres, when the parties made the contract under the erroneous belief that the boundary included only one hundred and sixty five acres, and fixed the price accordingly. And the opinion, written by Chief Justice Boyle, closes with the following remarks :—"But it is evident that the obligation was given under the influence of a mistake, as to the quantity contained in the boundary described in the obligation, and that, in fact, John purchased and paid for no more than one hundred and sixty five acres, at a stipulated price per acre ; and although the obligation given by James to John, might,

upon its face, be coextensive with the claim set up by the latter, yet we cannot doubt the propriety of resorting to such extrinsic circumstances, to *repel* the application to a court of equity to enforce the claim." From the language thus quoted, we may infer that the court was of the opinion, that the deficit—only about ten per cent. was insufficient to shew, *per se*, a mistake, but that parol evidence was admissible to *repel a specific execution*, by proving circumstances which a complainant, seeking relief against the legal effect of a conveyance, would not have been permitted to prove. And such doctrine needs not the support of authorities; it is founded on a plain principle of reason and of equity.

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The same doctrine was reiterated and applied in the similar case of *Shelby et al. vs. Smith's heirs and Ex'ors.* 2 Marsh. 513. In that case, in the opinion written by Judge Mills, the following language will be found:—"This court has determined that, in cases of executed contracts, surplus shall not be recovered back when the sale was made by the tract, and not by the acre. In such a case, the party purchasing may readily be presumed to run the risk of deficiency and to disregard it in the stipulation. It would, therefore, be improper to disturb the contract after he had waived the enquiry. But where the parties have both believed that there were two hundred acres in the tract, and it has been so represented at the sale, and, owing to a hidden mistake long ago made, it is deficient in that quantity to so large an amount as the present survey, (*about thirty acres*) and the contract is *executory*, we conceive it ought to be provided for by the chancellor, *before he enforces the contract*, as other losses and defects."

The case of *Cleveland vs. Rodgers*, 1 Marsh. 193, decided between the dates of the two last decisions, is vaguely and unsatisfactorily reported, and may appear to be rather anomalous. There it would seem, that a specific execution was coerced, though there might have been a surplus of about one hundred and sixty acres, in a tract sold in gross, as a tract containing about four hundred and fifty acres. But whether there was such a surplus,

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or, if there was, whether the complainant was the original or a subsequent *bona fide* buyer, without notice of any surplus, the opinion, as published, does not furnish the means for determining. If such surplus was satisfactorily established, and if the party seeking a decree, was the person who made the contract with Cleveland, who held the legal title, the opinion is inconsistent with the principle of all the other cases of a similar character, unless the peculiar terms of the agreement, or the proof of collateral facts, shewed that the surplus had been waived by the vendor, or was not greater than he had supposed or ought to have expected; and, we are inclined to infer, that the latter was one ground of the opinion in that case.

In *Rodgers vs. Garnet*, 4 Mon. 269, a conveyance in gross having been made of a tract of land supposed to contain about seventeen hundred acres, which had been sold in 1794. when it was deemed of but little value, this court refused to decree to the vendor compensation for about three hundred acres of surplus. There is nothing novel or peculiar in that case. *First*—considering the locality and value of the land, the time of the contract, the size of the tract, and the quantity of *surplus*, had the agreement remained executory, there may be sufficient reason to doubt whether, according to the application of the true principle in any authoritative decision, the surplus would have presented a sufficient barrier to a decree for a specific execution. *Secondly*—The deed and the circumstances attending its execution repelled all equitable claim to any restitution.

In *Hampton's heirs &c. vs. Eubank &c.* 4 J. J. Mar. 634, this court directed a specific execution of an executory agreement for the sale, in gross, of a tract of land supposed to contain four hundred acres, although there was a surplus of thirty five acres.

The agreement was made in 1789; and other facts, also proved in the cause, induced the conclusion, that the surplus was not larger than the parties expected, or might reasonably have expected; and the court said, in the opinion, that "if there was evidence of fraud or

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mistake in reducing the contract to writing, or if the surplus beyond the quantity *shewn by the proof to have been intended by the parties to be conveyed*, was excessive, there might be ground for the chancellor to interpose."

From an analysis of the cases, thus cronologically reviewed, the following principles may be deduced. *First*—When it is evident that there has been a *gross mistake* as to quantity, and the complaining party has not been guilty of any fraud or culpable negligence, nor has otherwise impaired the equity resulting from the mistake, he may be entitled to relief from the technical or legal effect of his contract, whether it be executed, or only executory—the passing suggestion, in 2 *Mar.* 513, intimating the contrary in cases of executed agreements, even were it not *obiturn*, would not be authoritative, because, in its universal application, according to its literal import, it would not only be irreconcilable with an obvious and pervading principle of reason and justice, but would conflict with "*Young vs. Craig*," (*supra*.) and with perhaps every other case which was ever decided on that point. *Second*—In executory contracts of sale in gross, it will not be so difficult to obtain relief from the literal effect of the agreement, as, for obvious reasons, it must generally be after the legal title has passed; and when the buyer seeks a specific execution, the seller will be permitted to resist his equity by consistent parol proof, which might be inadmissible were he, instead of the buyer, the complainant; and he may thus succeed whenever he can shew, that equity and conscience are opposed to a rigid and literal enforcement of the terms of the agreement, or unless the equity of the complainant's prayer is manifest; because, as a decree for a specific execution is a matter of sound judicial discretion, the chancellor will leave a party to his legal remedy unless his equity be clear and strong. The cases of *Smith vs. Smith*, and *Shelby et al. vs. Smith's heirs*, (*supra*) are strong and direct authorities. In the first, the surplus was only about ten per cent.; in the last, the deficit was only about fifteen per cent. But in each case, the proof evinced such a mistake about quantity, as, in the opinion of this court, to entitle the party, resisting

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the literal enforcement of the contract, to relief, to the extent of the surplus in the one case, and of the deficit in the other.

The foregoing principles are just and well established. The only difficulty is in their proper application; and hence alone has arisen any apparent discrepancy, in any respect, in the cases which have been just reviewed.

As was truly observed in *Young vs. Craig*, the equity of each case must depend on its own peculiar circumstances. The relative extent of the surplus or deficit cannot, *per se*, furnish an infallible criterion. The conduct of the parties—the date of the contract—the value, and extent, and locality, of the land—the price—and other nameless circumstances, are always important and generally decisive.

Sales in gross may be subdivided into various subordinate classifications: *First*—Sales strictly and essentially by the tract, without reference, in the negotiation or in the consideration, to any estimated or designated quantity of acres. *Second*—Sales of the like kind, in which, though a supposed quantity by estimation is mentioned or referred to in the contract, the reference was made only for the purpose of description, and under such circumstances, or in such a manner as to shew that the parties intended to risk the contingency of quantity, *whatever it might be, or how much sooner it might exceed, or fall short of, that which was mentioned in the contract.* *Third*—Sales in which it is evident, from extraneous circumstances of locality, value, price, time, and the conduct and conversations of the parties, that they did not contemplate, or intend to risk more than the usual rates of excess or deficit in similar cases, or than such as might be reasonably calculated on as within the range of ordinary contingency. *Fourth*—Sales which, though technically deemed and denominated sales in gross, are, in fact, sales by the acre, and so understood by the parties.

Contracts belonging to either of the two first mentioned classes, whether executed or executory, should

Every case of a sale of land, upon which relief is sought in chancery, upon the ground of a mistake in the quantity, must depend on its own peculiar circumstances.

Sales of land in gross may be subdivided into four classes—each class defined.

Where the sale of land was by the tract; or where the quantity is stated merely by way of description, chancery can afford no relief (when there is no fraud) on the ground of mistake in the quantity.—*End*

not be modified by the chancellor when there has been no fraud. Such was the contract in the case of *Brown vs. Parish*, lately decided by this court.—*Ante*, 6.

But in sales of either of the latter kinds, an unreasonable surplus, or deficit, may entitle the injured party to equitable relief, unless he has, by his conduct, waived or forfeited his equity.

Now the just application of the foregoing principles is not deemed difficult in this case. This belongs, we have no doubt, to the third classification. And even if, at the time of the contract, a deed, instead of a covenant, had been executed, we should be strongly inclined to the opinion, that Harrison would have been equitably entitled to some reclamation for an unexpected and unreasonable surplus. The date of the contract, the value of the land, and its locality, would altogether tend strongly to the inference that, as there is no proof that the parties contemplated more than an ordinary variation from the estimated quantity, the utmost range of the contingency which they intended that the terms of their written agreement should embrace, would not include so large a surplus, or deficiency, as ninety acres. And hence, as no circumstance rebutting the equity resulting from so gross a mistake, has been proved, it would be hard to decide that a conveyance, instead of the covenant to convey, would have precluded Harrison from an equitable restitution. But as the legal title has never been transferred to Talbot, and he has invoked the equitable interposition of the chancellor, he himself must do that which is equitable; and, unless he will consent to do so, his bill should be dismissed.

In addition to what has already been mentioned, as conducing to evince a gross mistake as to the actual quantity within the boundary, another and a strong fact in opposition to Talbot's asserted equity, has, we think, been satisfactorily proved: and that is, that the land was, in fact, sold at fifteen dollars an acre; and, estimating the total quantity at *about* four hundred, the

evidence, may be admitted, to show that the contract was in fact made with reference to the number of acres, as to which the parties were under a gross mistake, when the contract was drawn.

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Where it appears that tho' the sale was in gross—the parties did not contemplate or intend to risk more than a common surplus, or deficit; or where the sale, tho' technically a sale in gross, was, in fact, a sale by the acre, the injured party may have relief in chancery—provided he has not, by his conduct, waived or forfeited his equity.

Tho' a written contract may describe a sale of land, as a sale in gross, according to the technical import of the writing, parol evidence—not necessarily conflicting with the written

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parties *thus* agreed on the aggregate consideration of six thousand dollars. Such proof is doubtless admissible, to repel the equity asserted to a specific execution of the contract according to its technical or literal import. It does not necessarily conflict with, or contradict the written evidence; nor does it shew, that the parties did not understand the terms of their written memorial; but it only shews, or tends to prove, that there was a gross mistake as to the true number of acres; and hence similar evidence was admitted in the case of *Smith vs. Smith*, and was deemed satisfactory and controlling.

Without amplifying by further illustration or argument, deemed superfluous, we cannot resist the conclusion, that a court of conscience, called on to exert its extraordinary equitable discretion, in coercing a specific execution, cannot, consistently with justice, principle or authority, grant the prayer of the appellee.

Decree by this court:—the vendee to pay for the *surplus*, or accept a deed for the 400 acres, without it, (an option which the vendor had offered him;) or have his bill dismissed.

A complainant cannot have a specific execution of a contract in writing, varied or modified by parol evidence.

A vendee required to surrender a *surplus*, may elect from which end or side of the tract it shall be taken.

Wherefore it is decreed by this court, that the decree of the circuit court be reversed, and the cause remanded, with instructions to dismiss the bill, and remit Talbot to his legal right and remedy, unless he shall elect to take a conveyance, as proposed by Harrison, for four hundred acres, for the original consideration of six thousand dollars; or a conveyance of the entire tract, on payment for the surplus, at the rate of fifteen dollars an acre; and with instructions, also, to dismiss Harrison's cross bill—because, he cannot, in the attitude of a complainant, compel a specific execution of the contract, varied or modified by parol evidence, nor otherwise than according to the import and effect of the written memorial of the sale.

If Talbot should elect to take a conveyance for four hundred acres, he may elect on which end or side of the entire tract, the ninety acres shall be taken off for Harrison.

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Hanna and Company vs. Pleasants and Bridges.

COVENANT.

[Mr. Richardson for Plaintiffs: Mr. Monroe for Defendants.]

FROM THE CIRCUIT COURT FOR ANDERSON COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

October 11.

To an action of covenant by Hanna and Co., for the use of Cresson and others, as partial assignees, against Pleasants and Bridges, on their covenant to pay a certain sum in such money as was received in the Farmer's Bank of Harrodsburgh, they plead, in various forms, by way of set-off, certain promissory notes, which they held by assignment, on Hanna and Co. To a replication to one of these pleas, they demurred; and their demurrer having been sustained, judgment was rendered in their favor; from which Hanna and Co. prosecute this writ of error.

It is unnecessary to state the replication, as we deem the plea itself insufficient. The amount of damages to which the plaintiffs were entitled, being dependant upon the proof of the value of such money as was received at the Harrodsburg bank, the amount of their demand was unliquidated, and unascertainable by mere computation. Though the right to use the plea of set-off is undeniable in the actions of assumpsit and covenant, as well as debt, yet it is not allowed in assumpsit or covenant where the damages are unliquidated. *Tidd's Practice*, 603. *Roebuck vs. Tennis*, 5 *Monroe*, 83. The rule is believed to be without exception, that the right of set-off is mutual; and we hold it to be quite plain, that, according to the well established rules on this subject, Hanna and Co. could not have set off their demand against that of Pleasants and Bridges, if the latter

Liquidated demands only can be set off against each other, at law. The right is mutual, and if the demand of either party is unliquidated, there can be no set-off. Set-off of demands ascertained, — or depending on mere computation, — may be pleaded in assumpsit, or covenant, as well as in debt. But, where the demand of the *pltf.*, or that of the *def.*, depends on proof, the plea is inadmissible. In this case — upon a note, payable in such money as was received at a certain bank, the plea of set-off is held to be bad — the value of the money being uncertain,

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had been the plaintiffs; consequently, Pleasants and Bridges can have no such right of set-off as against them.

Judgment reversed, with costs, and cause remanded for further proceedings consistent herewith.

In response to the petition for rehearing.

The word *demand* in the statute concerning set-offs, may have been used in addition to the word *debt*, for the purpose of silencing a doubt, whether, under the English statute, set-off could have been plead in the actions of assumpsit and covenant. But be that as it may, we cannot conceive, that the legislature could have intended to use the word *demand* in its broadest sense. Such a construction would be productive of great inconvenience. It would allow questions of set off to be litigated in actions for slander, assault and battery and such like; which never could have been intended. We see no intermediate ground upon which we could safely land, if we were to depart from the construction intimated as the true one, in *Roebuck vs. Tennis*: that is, that the statute meant *monied demand* in its strict legal sense; which renders it of about the same signification as the term *debt*, and excludes the idea of allowing a set-off in actions for torts, and upon contracts for the payment of property and choses in action.

CHANCERY.

Coger against Coger.

[Mr. Owsley for Plaintiff: Mr. Harlan for Defendant.]

FROM THE CIRCUIT COURT FOR JESSAMINE COUNTY.

October 13 Chief Justice ROBERTSON delivered the Opinion of the Court.

The authority of the courts of chancery to decree the sale of WILLIAM J. COGER prosecutes this writ of error, to reverse a decree directing the sale of a tract of land, upon the petition of his guardian.

As the statute conferred on the chancellor only a special authority to decree the sale of real estate which descended to infants, he can have no jurisdiction, unless the estate was acquired *by descent*; and therefore, as his jurisdiction is special and limited, this decree cannot be sustained unless the record shew the fact which alone can give authority under the statute.

It does not appear, in this case, that the infant's title was acquired by descent; and therefore the circuit court had no jurisdiction; and consequently the decree directing the sale, must be reversed.

But, as the purchaser under the decree is not a party to the writ of error, we cannot now decide, as we have been urged to do, whether the decree is void, or merely erroneous; and whether, therefore, the reversal will affect the sale; for if the decree be void, the purchaser under it acquired no title whatever; but if it were erroneous merely, and not absolutely void, he may have acquired a title which the reversal might not, *per se*, divest.

Decree reversed, and cause remanded.

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the real estate of infants, extends only to estates descended to them.

Where a special jurisdiction is given by statute, the record must show a case within the statute; otherwise, a defect of jurisdiction will be presumed.

This court will not decide whether a decree is void or not, in a case where the purchaser of an estate sold under the decree, is no party—as on that, his title depends.

Moss *et al.* vs. Scott.

EJECTMENT.

[Mr. Owsley for Plaintiffs: Mr. Haggin and Messrs. Wickliffe and Wooley for Defendant.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

October 13.

Two patents—one for two thousand acres, the other for sixty five, issued to John May and Joseph Jones. Andrew Crocket filed a bill in chancery, asserting a claim to half these lands, and, by consent of parties, a decree was rendered directing the defendants to convey half the land to John Fishback, and appointing commissioners to make the partition and conveyance. This decree

The main question—as to a division line, settled by jury, upon evidence not stated: their decision approved by this court—*post*, 274.

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was executed by conveying to Fishback, the land designated on the connected plat, by the lines R O, O K, K F and the Kentucky river, around to R; or by the lines R O, O F, and by the river, around to R. The triangle O, K, F, is the land in dispute; and the main question is, whether the division line should run from O to K, and thence to F, or whether it should run directly from O to F. The deed to Fishback was executed in October, 1813.

The deed of a commissioner, appointed to sell and convey land under a decree so drawn as to include more land than the decree authorizes him to sell, may pass the title to the land embraced by the decree: no more

It seems that John L. May, Daniel Eppes and Polly his wife, acting as the legal representatives of John May, deceased, in March, 1814, sold to Robert Scott, seven eighths of a moiety of the two thousand acre tract, and were to convey upon being secured in the purchase money. Scott failing, a bill in chancery was filed by John L. May &c. to enforce their lien upon the land. Such proceedings were had, as eventuated in a decree, directing a sale of the land, to raise the purchase money, and a commissioner was appointed to make the sale, and convey to the purchaser. Mrs. Scott, the defendant in error, the widow of Robert Scott, who had departed this life, became the purchaser; and the commissioner conveyed to her the seven eighths of the two thousand acres, by deed, dated in October, 1821. This deed, however, can only be good to pass the title of seven eighths of a moiety, because the bill and decree, taken in connection, shew that the commissioner's sale was limited to that quantity.

In November, 1828, John L. May and Polly Eppes, styling themselves heirs and legal representatives of John May, deceased, conveyed to Mrs. Scott, the defendant in error, seven eighths of the land included within the bounds of the sixty five acre grant, as held by them. This deed, awkwardly drawn, was probably intended to pass the title of seven eighths of a moiety.

Mrs. Scott, asserting title under her deeds of October, 1821, and November, 1828, instituted an action of ejectment against Moss and Aldridge, tenants in possession, and recovered a verdict for a moiety of the land in the triangle O, K, F. Upon this verdict, the court

The judgment for the plaintiff in the ejectment—to which exceptions are taken here.

judged that she recover her term yet to come in the land and premises in the declaration mentioned.

Many exceptions are now taken to this judgment, and the proceedings which led to it. Such as are worthy of consideration will be noticed.

Before the cause came on to trial, Aldridge died, having previously entered himself a defendant. An order was made abating the suit as to him, and reviving it against Patsey Aldridge, his widow, and Eleanor Cochran and others, his heirs. The record states, that this order was made by "consent of the parties." After the death of Aldridge, there were no parties to the suit but Moss and the lessor, Mrs. Scott. These had no right to consent for the widow and heirs, and thereby make them parties, and proceed to trial without giving them notice. The record does not shew that the widow and heirs of Aldridge appeared, or were notified to appear. As by the death of a defendant in ejectment, his title is cast by descent or devise on the heir or devisee, and as the action is but a fiction to try the title between the real claimants, we cannot tolerate the loose practice of reviving by consent, unless it shall appear that those against whom the revivor is made, did, in person, or by attorney, assent to the order. Unless strictness is required in this respect, the representatives of deceased defendants might be prejudiced by trials conducted without their knowledge, and turned out of possession without an opportunity of being heard. The revivor against the widow and heirs of Aldridge is too irregular to be sustained. The act approved February 2nd, 1833, will hereafter regulate proceedings to revive in cases like this. As the representatives of Aldridge are parties here, there will be no necessity to take steps to bring them before the circuit court on the return of the cause.

It is contended, that the evidence does not warrant the verdict to any extent. It is certainly true, that unless John May, the patentee, was dead previous to the date of the demise laid in the declaration, the efforts made by Mrs. Scott to derive title through John L. May and Polly Eppes, as his heirs, must be unavailing.

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If one of several defendants in ejectment dies, the surviving parties cannot, by their agreement, revive the suit: the heirs or devisees of the decedent must be summoned; unless they appear in person, or by their attorney, and consent to the order of revivor. — See a late law on this subject. *Acts of 1832*, p. 248.

The parties here are parties below upon the return of the cause, and need not be summoned.

Recital of facts, from which, it is held, a jury might infer the death of an ancestor, and decedent cast, before the date of a demise.

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But the proof of John May's death at the trial, and that John L. May and Mrs. Eppes were then his heirs, connected with the records offered in evidence, and in which the manner of John May's death is mentioned, having been killed by the Indians, and all which seems to have been read without exception, we are inclined to the opinion, that the jury might have found legitimately from the circumstances, that John May's title had passed to his heirs prior to the date of the demise, and prior to the date of the deed of October, 1821.

An actual enclosure is not necessary to constitute a "possession," within the meaning of the champerty act of 1824.

The defendants moved the court to instruct the jury, "that they had no right to find a verdict for the plaintiff for any of the land in controversy embraced within the deed from May and Eppes to Mrs. Scott, and which land was, at the date thereof, in the possession of the defendants." The court amended the instruction by adding thereto the words, "by actual enclosure," and then gave it. The plaintiffs in error insist, it should have been given without the amendment. The first section of the act relative to champerty and maintenance, approved the 7th of January, 1824, makes void all contracts, executed or executory, purporting to convey or sell land, "of which any other person than the vendor or vendee shall, at the time of such sale or purchase, have possession, adverse to the right or title so sold or purchased." The act of assembly does not describe the manner of possession. It does not say that it shall be a possession by settlement, or by actual enclosure. It is well settled, that there may be a possession in fact of land not actually enclosed by the possessor. We believe it was the policy of the legislature to protect such a possession against the evils of speculation in pretended titles, and as the language of the act is unrestricted, we are of opinion that the court erred in confining its operation, in this case, to an adverse possession "by actual enclosure."

Conveyances made anterior to the champerty act, are not affected by it.

It appears from the proof, that the defendants had actual possession by enclosure, of part of the two thousand acre tract, on the south side of the line O F, and having made an entry on the land south of that line, with the intent to hold up to the line O K, their posses-

sion in fact would, on obvious principles, extend up to this last line, so as to embrace all the land in contest claimed by the defendants within the two thousand acre tract. But the champerty act could have no influence upon this part of the controversy, because the deed to Mrs. Scott for this land, was made before the passage of the act.

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vs.
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It does not appear that the defendants had any actual possession of the tract for sixty five acres, south of the line O F, at the time the deed of 1828 was executed, or at any other period, unless the running the line O K, in 1820, by them, and claiming up to that line and the line K F, should be considered sufficient to extend their possession in fact up to these lines. We do not regard it sufficient, because May's heirs and Jones held their interest in the sixty five acre tract south of the line O F, until Mrs. Scott purchased in 1828; and up to that period there was no tenant or adverse possession, which could have justified Jones and May's heirs, or either of them to institute an action to recover the possession; and hence there was no possession adverse in its character, to render a conveyance by them void under the champerty act. As there was no such possession, then, and as there is no evidence of any such possession having been acquired since, we cannot perceive the relevancy of the instruction growing out of the champerty act, nor do we see any ground to sustain the recovery against the defendants for any part of the land within the sixty five acre tract, south of the line O F, as they had no possession, at the institution of the suit. The instruction may have misled the jury, and is therefore cause for reversal.

Where there is no one upon the land, against whom a claimant could bring his action, to try his right, there is no adverse possession, within the meaning of the champerty act.

A verdict against a def't in ejectment not in possession at the institution of the suit, should not be sustained.

Upon the main point, whether O K, or O F, is the true division line, we deem it proper to say that we are satisfied with the conclusion of the jury upon the evidence before them. But, for the errors detected, the judgment must be reversed, with costs, and the cause remanded for a new trial.

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CHANCERY.

Taylor against Lyon.

[Mr. Owaley for Plaintiff: Mr. Kincaid for Defendant.]

FROM THE CIRCUIT COURT FOR LAUREL COUNTY.

October 14. Chief Justice ROBERTSON delivered the Opinion of the Court.

Sale of land;
judgt for a bal-
ance of the pur-
chase money;
injunction, and
allegations of
the bill.

TAYLOR having sold and conveyed to Lyon, five hundred acres of land, represented to be included in Remy's survey, in the county of Laurel, and having afterwards obtained a judgment for about seven hundred and fifty dollars—all that remained unpaid of the consideration; Lyon enjoined the judgment, and prayed for a rescission of the contract,—alleging that Taylor lived in the state of Tennessee; that he made false and fraudulent representations respecting his title; that the only pretence of title which he ever had, he derived by intermediate conveyances under Remy's patent; that Remy's survey does not cover the five hundred acres; that he (Lyon) had never accepted the deed from Taylor; that he *doubted* the legality of his derivative right; and therefore calling on him to exhibit the muniments of his title.

Denials and al-
legations of the
answer.

Taylor, in his answer, denied the imputed fraud; insisted that Remy's survey included the five hundred acres sold to Lyon; averred that Lyon had accepted the deed, and exhibited documents purporting to be a conveyance from Remy to Edwards, a deed from Edward's heirs to Pearl, and a deed from Pearl to himself. But, as those documents had not been properly authenticated, and, moreover, as the deed from Edward's heirs had not been fully executed, he filed a cross bill against Pearl, the heirs of Edwards, and the unknown heirs of Remy, for the purpose of confirming and perfecting the legal title.

Cross bill.

Decree of the
circuit court.

Without disposing of the cross bill, the circuit court decreed a rescission of the contract between Taylor and Lyon; and the propriety of that decree is the main question now to be considered.

The plaintiff in error has no just cause to complain that his cross bill was continued; for it does not appear that he had brought all the heirs of Edwards before the court; and, though he had alleged, that Remy's heirs were unknown, a subpoena, designating them by name, was afterwards issued, and returned executed, without any allegation or proof that they were the heirs of Remy. But the decree rescinding the contract cannot be sustained.

The deed from Taylor to Lyon must, from the proof, be deemed to have been accepted; and, though it was not fully proved in time to be legally recorded, it is good and effectual between the parties; and it was Lyon's duty, after accepting it, to have had it properly proved and recorded. There is no sufficient proof that Taylor was guilty of any fraud in the contract. There is not a particle of proof tending to shew, that he knew or suspected that his title was, in any respect, defective or inferior. On the contrary, the long time during which the land had been occupied by those claiming to have been purchasers under Remy, without any question or doubt as to the validity of their title, and other more minute circumstances which appear, indicate satisfactorily, that Taylor had never doubted the validity or the superiority of his legal right, and had acted in good faith in representing his title as a good one, and in selling and conveying it as such—The representation that his title was good cannot therefore affect the case. *Carrico vs. Froman*, 2 *Lillell's Rep.* 178.

The point to which the attention of the parties seems to have been chiefly, and almost exclusively directed in the preparation of the case in the circuit court, is, whether Remy's patent includes the land conveyed by Taylor to Lyon. Whether that patent includes the whole of that land, or only about one half of it, depends on whether the mouth of Raccoon, as called for in the survey, or the mouth of Pond creek, be the true beginning of Remy. Upon this point the preparator to rely upon the covenants inserted in the conveyance, and must abide by his legal remedy—unless there are such circumstances connected with the defect of title as will hinder him from obtaining redress at law: in which case, he may obtain an injunction, to stop the collection of the purchase money, until a decision upon the title can be had.

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Taylor
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The comp't in a cross bill, not duly prepared, can't complain that it is continued at the trial of the original bill.

A deed not proved in time to be recorded, is good between the parties to it. The grantee, upon accepting it, should have it proved and recorded.

No proof of fraud in this case: the vendor appears to have acted in good faith, not doubting the sufficiency of his title.

Defect of title, where there is no fraud in the sale, the contract executed, and no eviction, is no ground for rescission, or injunction against collecting the purchase money. The grantee is presumed to be his legal remedy as will hinder him from obtaining redress at law, to stop the collection of the purchase money, until a decision upon the title can be had.

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tion has been unusually elaborate, and the testimony is vexatiously contradictory and inconclusive. How the facts, as exhibited in this record, should be deemed to preponderate, we shall not decide; because, were it admitted, that, in making the original survey, the mouth of Pond creek was, through mistake, made the place of actual beginning, instead of the mouth of Big Raccoon creek, which was designated by name, and was intended as the place of beginning, still we could perceive no sufficient ground for rescinding the contract, executed, as it appears to have been, without circumvention or fraud. Such a case would be only the common one of a *bona fide* conveyance of land, each party believing the title good at the time, but which turns out to be defective, or inferior to some other conflicting title. In such a case the vendee, being in the undisturbed possession, must—according to a general principle of equity, well settled and well understood, rely on his contract for indemnity, and has no just claim to a coercive rescission of a fair, executed agreement, made with an expressed or presumed view to the contingency of the defectiveness or inferiority of the vendor's title. There is no authority for decreeing the rescission of such a contract for such a cause: all the authoritative adjudged cases are to the contrary. After a scrutinising survey of the authorities, Chancellor Kent said in *Bumpus vs. Platner*, 1 *Johnson's Ch. Rep.* 218, that “*there is no case of relief*,” on the ground of a failure of consideration, *when possession has passed and continued without any eviction at law under a paramount title* ;” and, in *Abbot vs. Allen*, 2 *Ib.* 519, the same Chancellor, after reviewing the adjudged cases, said—“*I know of no case in which this court has relieved the purchaser where there was no fraud and no eviction*—all the cases that I have looked into, proceed on the ground of a failure of the title duly ascertained.”

Many cases to the same effect have been decided by this court. *Miller vs. Long*, 3 *Marshall*, 334; *Golden vs. Maupin*, 2 *J. J. Mar.* 239, and *Simpson et al. vs. Hawkins and Cochran*, 1 *Dana*, 303.

The unexpected insolvency or removal of the vendor, may, in peculiar cases, authorize an injunction against

the enforcement of the purchase money, until the purchaser can have the question of doubtful title settled; *Rawlings vs. Timberlake*, 6 Mon. 225; *Payne vs. Cabell*, 7 Ib. 198, and *Golden vs. Maupin*, and *Simpson vs. Hawkins*, *supra*. But, where there is no such obstruction or deficiency in the legal remedy, the chancellor should not even enjoin the unpaid purchase money: such is the doctrine ruled in the cases just cited from *first and second Johnson's Chancery Reports*; and it accords with principle and analogy.

It is to be presumed, that the purchaser examined the muniments of title before he accepted a conveyance. It was his duty to do so; and, if he failed, he was guilty of what is denominated *crassa negligentia*. It is to be presumed, also, that he intended to look to the provisions and obligations of his contract, and not to a vacation of it, for indemnity for any deficiency in the title of his vendor. If he took no covenant of seizin, which would have enabled him without an eviction, to put the title to a legal and decisive test at any time, he cannot call on the chancellor to supply such an omission in the contract, and, by anticipating an eviction, to decree a rescission. Why rescind? However defective the title may be, it is—even if the vendee could not have detected its true character by proper vigilance when he made his contract—only what the parties to every such contract must be presumed to have contemplated—that the title might, at some time, be discovered to be imperfect or inferior; for which contingency, when the purchaser does not intend to hazard it, he provides his own security, by the terms of his agreement; and which, in this case, has been provided for by the covenant of general warranty in the deed of conveyance to Lyon.

As then, there is no proof of fraud, the contract should not be rescinded for that only, which its very nature and terms prove that the parties contemplated as a possible contingency, and therefore provided for in the mode they thought fit to adopt.

But, even when there is no eviction, and no fraud, a purchaser, who shall *shew* that he is in obvious and im-

stances (described in the text) may be allowed an injunction to stop the collection of the purchase money, without shewing any fraud, or any eviction.

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A purchaser, by
executed con-
tract, — under
peculiar cir-
cumstances, may be allowed an injunction to stop the collection of the purchase money, without shewing any fraud, or any eviction.

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nent danger of eviction, may enjoin the enforcement of the consideration money remaining unpaid, if he can also shew that, in consequence of the unexpected insolvency or removal of the vendor since the acceptance of the deed, he may sustain an irreparable loss, or may be subjected to unforeseen and unreasonable inconvenience or peril, in the event of a future eviction, *really apprehended*. Such a preventive remedy is founded on a broad and comprehensive principle of equitable jurisprudence—the principle of *quia timet*. But it extends, no further than to prevention of a loss, or to security against a danger, *unexpected* at the time of the conveyance; and should not, even then, be applied unless the complaining party evince an honest disposition to have the title perfected or guarantied, and make proper efforts for the effectuation of that end, and for a trial of all conflicting claims.

A vendee who can avail himself of an adverse possession of twenty years, is not entitled to an injunction upon a judgment for the purchase money.

Lyon has not shewn any equitable right to an injunction, in consequence of the allegation that Remy's survey does not include all the land conveyed to him by Taylor; because, were there no other reason, George Thompson's patent, more than twenty years old, covers the whole five hundred acres, if Remy's survey does not; and it may be presumed, that the adverse occupancy under Remy, for more than twenty years, would afford ample protection to Lyon, against the claim of Thompson, who, as this record shews, was still living after twenty years had run.

Cause remanded: comp't to have leave to amend his bill, and shew circumstances, appearing to exist, which will sustain his injunction, and entitle him to relief in chancery.

But, as it appears from the shewing of Taylor himself, that his legal title is not perfect and unquestionable, and as the statute of limitations would not affect the rights of any of the vendors who had not parted with the legal title, and as it also appears, that Taylor has removed from Kentucky since the date of his conveyance, Lyon would be entitled to his injunction upon shewing reasonable ground for apprehending that any of those from whom Taylor claims to have derived his right may successfully assert title to the land, and bringing such persons before the court, to assert or relinquish their claims. He has not *distinctly averred* any such apprehension; nor has he attempted to quiet or perfect his

title : but, from what appears, there may be some cause for apprehending some eventual danger ; and therefore, on the return of the cause to the circuit court, he may have leave to amend his bill, and make, if he choose, appropriate allegations, and all proper parties, for the purpose of perfecting his title, or of having a decision equivalent to an eviction, in the event of a failure to procure a perfect derivation of title from the patentee.

Wherefore, it is decreed by this court, that the decree of the circuit court be reversed, and the cause remanded, with instructions to maintain the injunction, if Lyon should elect to amend his bill, as has been suggested, and to dissolve it, without damages, on the final hearing on that amendment, provided an unquestionable title be obtained : otherwise to perpetuate it, in the event of a virtual eviction by any of those through whom the title must pass before it can be safely and fully vested in him. But, in the event of his failing to take such steps in proper time, to dismiss his bill, with costs, and dissolve his injunction, with damages.

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1834.

Pogue
vs.
Shotwell &c.

Mandate.

Pogue against Shotwell and Others,
and
Shotwell and Others against Pogue.

CHANCERY.

[Messrs. Morehead & Brown for Pogue : Mr. Crittenden for Shotwell &c.]

FROM THE CIRCUIT COURT FOR MASON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court. *October 15.*

On the 19th of December, 1807, Bodley, Hughes and Pogue sold and conveyed to Shotwell, two hundred and nineteen acres of land, supposed to be included in a tract of ten thousand acres, granted to Tibbs and Crutcher, whose title had passed to the vendors. On the 28th of March, 1811, Shotwell reconveyed to the same persons, "all the land that might be found to interfere between a survey" of four hundred acres, in the name of John Mosby, and the two hundred and nine-

History of the
suit at law, the
judg't in which
was enjoined in
this suit.

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Pogue

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teen acres which they had conveyed to Shotwell; and, on the same day, they conveyed to James Brown, two thousand one hundred and sixty nine acres, including, as was then believed, the land which Shotwell had reconveyed to them. Pogue undertook, by his separate covenant, to pay to Shotwell, eighteen months after the date of the conveyance, four dollars an acre, as the entire consideration for the interference then of unascertained quantity, but which, as Pogue alleges, was estimated at seventy five acres.

Afterwards, not being able, in consequence of doubts respecting the true position of Mosby's four hundred acre survey, to agree as to the extent of the interference between that survey and the two hundred and nineteen acres—the one party contending for about one hundred and forty three acres, and the other for about thirteen acres,—Shotwell sued Pogue on his covenant; and, in August, 1827, Shotwell having died, and the suit having been revived in the name of his administrator, judgment was rendered against Pogue, for seven hundred and thirty five dollars, in damages.

The bill in this case; its allegations and prayer for relief, in various modes, against the judgment at law.

To enjoin that judgment, Pogue filed a bill in chancery against the administrator and heirs of Shotwell and against Bodley and the heirs of Hughes—alleging that the jury had been grossly mistaken as to the extent of the interference for which he had covenanted to pay; that fifty acres of that interference, as the jury must have established it, had been conveyed by Shotwell to one Dye, previously to his conveyance to Bodley & Co., and therefore, to that extent, Shotwell had no title, and the consideration had failed; that Shotwell had never surrendered the possession of the land which he had reconveyed to Bodley & Co. and that his heirs still retained the possession, although neither Brown's deed to him, nor the conveyance by Bodley & Co. to Brown, including the whole of it; that, from his own calculation, upon what he deemed the proper *data*, he inferred that, assuming, as the jury must have done, one hundred and forty three acres as the quantity for which he had covenanted to pay four dollars an acre, credit had not been given in the assessment of damages,

for one hundred and ninety dollars which he had paid to Shotwell, in August, 1814, and which was, rather obscurely, endorsed on the covenant: and therefore praying for an injunction, and for a decree for a credit for the hundred and ninety dollars, and for the land which had been conveyed to Dye, and for restitution of the possession of so much of the land conveyed by Shotwell to Bodley & Co., as was not embraced by their deed to Brown; and lastly, and more comprehensively, for a perpetuation of the entire injunction, and a restitution of a part of the one hundred and ninety dollars, on the ground that, (as he alleged and averred that he could prove,) the true extent of the interference was not one hundred and forty three acres, and did not exceed about thirteen acres.

The circuit court having perpetuated the injunction for the one hundred and ninety dollars and legal interest thereon from the time of payment, and dissolved it for the residue of the judgment, without making any further or other decree in favor of Pogue, both parties have prosecuted writs of error.

We have been unable to perceive sufficient ground for perpetuating the injunction for the payment of one hundred and ninety dollars, made in 1814. For, although the administrator concurred, in his answer, so far with the calculation exhibited in the bill, as to be induced to admit, as a probable deduction, that the jury had not considered the endorsement on the covenant, of the credit for one hundred and ninety dollars, and therefore had not included it in their estimate of the damages; nevertheless it is demonstrable, that both parties were mistaken in their conjectural calculations, and that the one hundred and ninety dollar credit must have been allowed by the jury. It is evident, that the basis of the assessment was a decision by the jury, that Mosby's survey of four hundred acres interfered with the two hundred and nineteen acres conveyed by Bodley & Co. to Shotwell, to the extent of one hundred and forty three acres, as contended for by Shotwell in the action at law. It is equally evident that, in order to make the amount of the verdict, (seven hundred and

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Decree of the  
circuit court, &  
writs of error  
by both parties.

Decree, enjoin-  
ing \$190 with  
its interest,—  
an am't which  
Pogue had paid  
to Shotwell be-  
fore suit, and  
which he char-  
ges that the ju-  
ry failed to al-  
low credit for,  
*reversed*—it ap-  
pearing, by a  
calculation up-  
on the data on  
which the ver-  
dict was made  
up, that the ju-  
ry *did* allow the  
credit—though  
the answer con-  
cedes that they  
did not.

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twenty five dollars,) interest, whether erroneously or not, was allowed from the time when Pogue was to pay, to the date of the verdict. And it is indisputably certain, that, *after deducting the hundred and ninety dollars*, those data would produce a balance rather larger than the amount of the verdict. Hence, as Pogue did not positively affirm, and Shotwell did not positively admit, that the hundred and ninety dollars had been pretermitted by the jury, but the opinion of each of them was an erroneous deduction from presumed premises, and, as there is not only no other evidence of any omission or mistake by the jury, but intrinsic proof that the credit of one hundred and ninety dollars was deducted in assessing the damages, we feel constrained to decide that Pogue has not shewn that he was entitled to that credit again.

Reversal, also,  
for Pogue.

But we must also reverse the decree for error, in other respects, prejudicial to Pogue.

Chancery cannot relieve against a judgment, upon the ground that the verdict was rendered excessive by erroneous deductions of the jury, from the evidence: a new trial at law, is the only remedy.

We are satisfied that, although the verdict may have been grossly and manifestly erroneous in assuming, as must have been done, so great an interference as one hundred and forty three acres, no sufficient ground has been established, or even alleged, for authorizing a revision or modification of the judgment by the chancellor. The only appropriate remedy was an appeal to this court, there being no proof, or satisfactory allegation, that Pogue had not ample opportunity for making all the proper preparation.

A party in possession of land, agrees to reconvey a portion, on which there is an interfering claim, to his grantor; who gives his note to pay \$4 an acre, for it—the quantity then unknown. In a suit, by the administrator of the obligee in the note, (who had died in the meantime,) the jury are satisfied, that, the

Nevertheless, we are of opinion, that Pogue is entitled to some relief in a different mode. Mosby's survey of four hundred acres, laid down as Pogue insisted, before the jury, it had been originally made and should be established, and as we too are strongly inclined to think it was made, and should be settled, includes only about thirteen acres, of the two hundred and nineteen acres conveyed by Bodley & Co. to Shotwell; which interference, whatever it may be in quantity, is embraced by the deed from Bodley & Co. to Brown, and the deed from him to Shotwell, and does not include any part of the fifty acres conveyed by Shotwell to Dye. And consequently, according to this view of the case,

as Shotwell had reconveyed to Bodley & Co. nothing but the interference, and as Pogue's obligation was given for that consideration alone, there would be no ground for a perpetuation of the injunction to any extent, or for any decree for restitution of possession.

But, laying down Mosby's survey, as the jury must have decided that it should be laid down, so as to produce an interference to the extent of one hundred and forty three acres, it will include a part of the fifty acres, which Shotwell had conveyed to Dye, and a considerable portion of Shotwell's two hundred and nineteen acres, not embraced by the deed from Bodley & Co. to Brown, *when truly applied*, and some land also not included in Brown's deed to Shotwell. If then this be the true position of Mosby's survey of four hundred acres, it is evident that, as Shotwell reconveyed to Bodley & Co. the whole interference, or, in other words, the one hundred and forty three acres, Shotwell's representatives should surrender the possession of so much of that quantity as Brown did not convey to him, and so much, also, as Bodley & Co. had not conveyed to Brown, excepting the parcel covered by Shotwell's conveyance to Dye, previously to his deed to Bodley & Co., and for which, as Shotwell had no title to it, his representatives should account. Whether such be the true position of Mosby's survey, or whether its proper and actual position, as originally made, will include one hundred and forty three, or only thirteen acres, of the two hundred and nineteen acres conveyed by Bodley & Co. to Shotwell, should not be deemed material in this suit; for, as the administrator has obtained a judgment for damages, for the one hundred and forty three acres, and could not have been entitled to any judgment whatever, unless he had prevailed on the jury to decide, that the interference was to that extent, he is so far estopped that he should not be permitted to prove that the true interference is only thirteen acres, or other quantity less than one hundred and forty three; and certainly equity could not permit the administrator to coerce the damages adjudged to him for one hundred and forty three acres, and also suffer the heirs to hold the same

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interference is 143 acres—verdict and judgment accordingly. — The interference was really *far less*: but the representatives of the decedent (the 'no parties to the suit at law,) are estopped from showing that fact, in a suit in chancery, for relief against the judgment. They shall reconvey the 143 acres, or so much of it as they hold; and, till they do so, the injunction may be continued; for so much as they cannot restore, and for the rents and profits of the whole, they shall account; and thus far the injunction may be perpetuated.

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land, on the ground that the actual and true interference is only to the extent of about thirteen acres, and that they are not estopped by the trial or the judgment at law, to which they were no parties. The representatives are not entitled to both the judgment and the land for which it was given. Pogue is surely entitled to be relieved from such manifest injustice, and a court of equity is the appropriate forum for the proper adjustment of the equity resulting from such a state of case, produced by great and unaccountable mistakes by Brown and Pogue and Shotwell himself. When Brown conveyed to Shotwell, he labored under a mistake as to the true boundary of the deed from Bodley & Co. to himself; for it is evident that he conveyed to Shotwell, land which Bodley & Co. had never conveyed to him, according to the true boundary of their deed, running to D on the plat. It seems to us, then, that Pogue is entitled to a perpetuation of his injunction to so much of the judgment as must have been given for the quantity of land included by Shotwell's deed to Dye, and by the survey of Mosby, when laid down in the manner in which the jury must have deemed it to lie; and to a perpetuation also, of the entire injunction, until the heirs of Shotwell shall make restitution of all the residue of the land embraced by the one hundred and forty three acres, and not included by the deed from Bodley & Co. to Brown; and also, if such restitution shall be made, to a perpetuation of the injunction for the value of the rents and profits of the land so restored, to be ascertained by the court.

It does not appear, that Brown had any other available title than that conveyed to him by Bodley & Co.; nor does it appear, that Shotwell had any other right than that which he derived from Brown and from Bodley & Co. A restitution, or injunction, therefore to the extent which has just been suggested, seems to be but right and equitable, and will only, so far, place the parties in *statu quo*.

Brown, as he is no party, will not be affected by this opinion.

Wherefore, it is decreed by this court, that the decree of the circuit court be and the same is hereby reversed, and the cause remanded, for a decree according to the foregoing opinion.

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## Arnold vs. Leathers.

EJECTMENT.

[Mr. Haggin for the Appellant : Mr. Crittenden for the Appellee.]

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FROM THE CIRCUIT COURT FOR CAMPBELL COUNTY.

October 15.

Chief Justice ROBERTSON delivered the Opinion of the Court.

WHETHER the plaintiff in error was entitled to a new trial, depends solely on the question, whether there is any bill of exceptions which this court can regard as a legal certification of the proofs on the trial.

A paper purporting to be a bill of exceptions is presented. But it is not signed either by the Judge, or bystanders. Three persons certify that the bill of exceptions was presented to the Judge, and he refused to sign it; and the Judge states an insufficient reason for his refusal. The case, therefore, is of that class provided for by an act of 1793, 1 *Dig.* 188. In such a case, when the circuit judge shall have refused to sign, and for that refusal assigned, either no reason, or insufficient reasons, the record should shew, that the bill of exceptions contains the truth; and the signatures of three bystanders, affixed to the bill itself might be a sufficient attestation of its truth; because, by signing it, the bystanders attest its truth; and the fact that the Judge did not controvert its truth, is a confirmation of the attestation.

But here there is no such attestation. The collateral certificate that—the bill of exceptions was presented to the Judge, and that he refused to sign it, cannot be construed as importing that the bystanders knew, or meant to certify, that the facts stated in it are true.

Wherefore, we are constrained to affirm the judgment.

A bill of exceptions may be signed by three bystanders, upon the refusal of the judge to sign it, (Act of '93, *Dig.* 188;) and their signatures to the bill itself may be taken as a sufficient attestation of its truth; but where they sign, not the bill, but a certificate stating that it was presented to the judge, and that he refused to sign it—this is no attestation that the bill contains the truth—which must appear by the record, or this ct. cannot receive it as an exemplification of the proofs on the trial below.

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1834.

CHANCERY.

## Couchman *against* Boyd.

[Mr. Crittenden for the Appellant : Mr. Owsley and Mr. John Trimble for the Appellee.]

FROM THE CIRCUIT COURT FOR NICHOLAS COUNTY.

October 17. Judge NICHOLAS delivered the Opinion of the Court.

After a judgment on a title bond, for a failure to make the conveyance, the obligor cannot, in general, enforce a specific execution of the contract, or obtain any relief in chancery from the judgment at law. But there are exceptions : here, the purchaser knew the state of the vendor's title at the time of the purchase ; had received and continued to hold the possession ; sustained no injury for want of the legal title ; had paid all the purchase money—the last payment enforced by suit ; the vendor, before the suit, had apprized the purchaser that he was ready and willing to convey, and, pending the suit, had obtained a complete title, and tendered a deed to the purchaser. BOYD, being the equitable proprietor of a house and lot, as assignee of a bond for the title, sold the house and lot to Couchman, and gave a bond for the conveyance of the title when the purchase money should be paid. Couchman took possession and has held it ever since. The last of the purchase money was collected by execution the 25th December, 1825. Couchman instituted suit on the bond, the 5th September, 1826, and obtained judgment against Boyd for failing to convey. On the 19th of September, 1826, before verdict or judgment, Boyd obtained the title, and then executed and tendered Couchman a deed for the property, which he refused to accept. Couchman was aware of the situation of the title at the time of his purchase. It does not appear that he ever made any demand for a conveyance, or that he had been prejudiced in any way by reason of his not having received it before the tender made by Boyd. Shortly after the rendition of the judgment, Boyd filed his bill for injunction against the judgment, and for a specific enforcement of the contract. It is inferable from the answer and proof, that between the payment of the purchase money, and the institution of the suit at law, Boyd had apprized Couchman of his readiness and willingness to convey the title, at any time that he might desire it, and it does not appear that the latter made any objection to receiving it, or insisted upon an immediate conveyance. He stated to a witness, that he could obtain it at any time from Boyd. The circuit court granted the relief prayed for, and Couchman has appealed.

Upon the state of case here presented, Boyd could



have compelled Couchman to take the title, provided he had applied to the chancellor for that purpose, at any time before the judgment at law, as was determined in *Woodson vs. Scott*, 1 *Dana*, 470.

The only question, therefore, is whether the permitting judgment to go against him, before he filed his bill, has so altered the attitude of the parties as to preclude that relief.

Several of the cases decided by this court, speak of that as an important, if not a controlling circumstance upon the question of specific performance at the instance of the vendor. It, no doubt, should in the general be so treated. But some exceptions to the rule have been heretofore recognised, and there may still be others.

It was decided in *Woodson vs. Scott*, that the bare fact of suit having been brought on the bond before tender of a conveyance, was not of itself sufficient to prevent a specific performance; and we are not aware of any case in which it has been held, that the judgment would preclude the vendor from relief, where the tender was made before judgment. In none of the cases where relief has been refused, had the purchaser been placed in the wrong by a tender and refusal to accept before judgment.

The purchaser's remaining quietly in possession, making no demand of a deed, and doing no act indicative of a determination to rescind the contract, is well calculated to lull the vendor into security, and induce the absence of that prompt diligence, in the tender of a deed, which might otherwise be expected. This effect is still more apt to be produced, where, as here, the vendor had apprized the purchaser of his readiness and willingness to make the deed at any time when it would suit his convenience to receive it, without any complaint made of the delay that had then occurred, or demand for an immediate execution of the deed. It would be rigorous in the extreme, to say, that the vendor had been culpably negligent in permitting, under such circumstances, nine months only to elapse, before he made the tender. It may therefore be well assumed

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ser—who had, until his suit, neither refused the title, nor demanded it, nor evinced any disposition to rescind the contract: held that, under these circumstances, he was bound to take the title, not with standing his judgment at law—the injunction on which, is perpetuated, except as to the costs; thus far, it is dissolved, with damages.

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that, at the time the deed was tendered in this case, Boyd was not in culpable default: Couchman ought to have received it. A court of equity would, if then applied to, have compelled him to receive the deed. The court could only do this on the ground, that, at the time of the tender, it was his duty to have accepted the deed, and this duty could only be enforced, because it was the right of the other to demand its enforcement. Though such tender is no answer to the action at law on the bond, yet, according to the view which equity takes of the matter, the attitude and rights of the parties are then fixed; and it surely cannot be competent for the vendee to absolve himself from that attitude, with its accompanying duties, by any act dependent on his own volition—whether his own merely, or that of a court of law obtained at his instance and through his procurement. The judgment thereafter rendered by his procurement, would be in direct violation of his then existing obligations and duties towards the vendor, if it were to have the effect of releasing him from those obligations and duties. The judgment so obtained, cannot be successfully relied upon by him, as an advantage fairly and properly obtained, of which equity has no right to deprive him. An advantage that is obtained in violation of our equitable duties towards others, can never be viewed by a court of equity as fairly and properly obtained. On the contrary, to relieve against legal advantages, obtained in derogation of equitable duties, is the broadest and most comprehensive head of equity jurisdiction and power.

The court therefore did right in restraining Couchman from recovering back the purchase money, and in compelling him to take the title. But as he was in no default at the time he brought his suit at law, he had an equitable, as well as legal right, to proceed in that suit, for a recovery to the extent of his costs at law, and he should not have been restrained therefrom.

Decree reversed, with costs, and cause remanded, with instructions to modify the decree, so far as to dissolve the injunction with damages, to the extent of the cost of the action at law.

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**Henderson vs. Stringer.****ASSUMPSIT.**

[Mr. Cunningham for Plaintiff: Mr. Owsley for Defendant.]

FROM THE CIRCUIT COURT FOR PULASKI COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

October 20.

THIS action was brought for the board and funeral expenses of the defendant's wife.

Statement of the facts.

She voluntarily left her husband, and for four years previous to her death, lived apart from him—most of the time at her mothers, but for the last six months, at the house of the plaintiff, who was her brother-in-law. During the time she was at plaintiff's house, she was sick, and unable to do any thing towards earning a support. She was properly attended till her death, and then buried at the plaintiff's expense. She had no means of subsistence of her own, and none were provided by the defendant.

The separation was not produced by any personal violence, on the part of the husband, inflicted or threatened; nor was he otherwise guilty of any misconduct, such as would justify her in leaving him. She left him notwithstanding his persuasions and remonstrances against her doing so. He requested her return, on more than one occasion, after the separation and previous to her stay at the house of plaintiff, which she refused. Whilst at the house of plaintiff, he visited her two or three times, and at the first of these visits, again requested her to return to his house. She expressed a willingness to do so, but said she was too weak to ride. The witness also stated, that during this visit, "she went off on foot, and was gone about an hour and a half, but where she went, he did not know."

Upon proof exhibiting substantially the foregoing state of case, the court instructed the jury, that, "the plaintiff could not recover for the board of the defendant's wife, unless there was proved an express agreement on the part of the defendant, to pay for it. But

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Judgment for  
defendant.

An *express* promise to pay for board, is not necessary to prevent the act of 1663, 1 Dig. 465, from defeating the recovery. If the entertainer gives the guest to understand distinctly, that his entertainment is not given in hospitality, but to be paid for, it will take the case out of the operation of the statute.

The husband is bound to maintain his wife; and if he drives her off, or so treats her as to justify her leaving him, it entitles her to credit for necessaries. But for board, when he who received the wife, had not declared his intention to claim it, (1 Dig. 465) there is no liability.

The husband's assent, to his wife's contracts for necessaries

if they believed, he had driven his wife off by beating her, or by other treatment which she could not be reasonably required to endure, that he was liable to plaintiff for her board; and that defendant was liable for her nursing and burial expenses, unless she had eloped from defendant without proper cause."

Under this instruction the jury found a verdict for the defendant, which the court refused to set aside.

The instruction is somewhat carelessly drafted, and its several parts, in consequence, not altogether reconcilable with each other. The first member of it, was probably given with an eye to the Virginia act of 1663. But, according to the construction given to that act by this court, there is no need of the express promise to pay, required by the instruction; and it would be sufficient, in a case circumstanced like this, if the plaintiff had distinctly informed either the wife or husband, that her stay at his house was not to be considered in the light of mere hospitality, but that he should require remuneration therefor, in order to exempt the case from the operation of that act. The distinction is not material as to any bearing upon the facts as made out in proof, and is merely suggested, because the case may assume another aspect at a future trial. We deem the instruction substantially erroneous on other grounds.

The law undoubtedly imposes upon a husband, in the general, the obligation of maintaining his wife, and he is compellable to find her necessaries. It is true, also, that if he abandons her, or drives her off, or by cruel or improper usage, compels her to abandon him, he gives her credit for necessaries, suitable to his estate and degree, wherever she can procure them. But still his liability therefor, is the result of a contract, either express or implied on her part, and for board obtained under the circumstances of this case, the law will imply no contract, unless the plaintiff had declared his intention not to furnish it gratuitously.

During cohabitation, the husband's assent to the wife's contracts for necessaries for herself and family, may be, and generally ought to be, implied.

When she elopes with an adulterer, or voluntarily leaves her husband and lives apart, without improper usage from him, there being no ground for inferring his assent, it cannot be implied, and he is not bound by her contracts for necessaries. But it has been held that his assent shall generally be intended, if after separation he again receives her, so also, if she offers to return, and he, without sufficient cause, refuses to receive her, his liability upon her contracts for necessaries, is from that time, revived, and he stands in the same attitude as if he had then wrongfully turned her away. The principle couched in the latter branch of the instruction, that the husband is not liable if his wife elopes without proper cause, is therefore correct in the abstract; but was not properly qualified to suit the facts of this case. For the defendant's visits to his wife, during her stay at the house of the plaintiff, and his proffer to take her back, coupled with her assent thereto, might well have been taken by the jury as a reconciliation, and equivalent to an actual taking of her back, provided they believed her excuse for not returning was well founded and not merely feigned. If they believed that a *bona fide* reconciliation had taken place, and that their actual cohabitation was only prevented by her inability to travel, they might well have charged him with the necessaries furnished.

It is for not having referred this matter to the determination of the jury, we deem the instruction erroneous, and that the judgment must be reversed, with costs, and the cause remanded for a new trial and further proceedings consistent herewith.

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for herself and family, is implied during cohabitation. Not so, when she has eloped without sufficient cause. But if he receives her again, after a separation, or if she desires to return, and he, without sufficient cause, refuses to receive her, his assent to her contracts for necessaries, thenceforward, will be inferred.

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DEBT.

**McCormick vs. Young.**

[Mr. Crittenden for Plaintiff: no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR LIVINGSTON COUNTY.

October 21. Judge UNDERWOOD delivered the Opinion of the Court.

The covenant of a lessee to pay rent, concerns the realty, and binds his assignee for the rent due after the assignment. Notes or bonds given for rent, the payment of which is secured by lease, not being of higher nature, do not extinguish the rent; for which the assignee of the lease is liable, notwithstanding the landlord may have taken the notes of his lessee, for it.

"UPON a covenant running with the land, which must concern real property or the estate therein, the assignee of the lessee is liable to an action for a breach of covenant committed after the assignment of the estate to him." 1 *Chitty's Plead.* 55.

Young, as the assignee of McCormick's lessee, was liable, in the action of debt, for the rent reserved, and which became due, for the use of the premises, after the assignment of the whole term to Young.

It is true, that McCormick's lessee executed notes for the amount of rent reserved, on the day the covenant or lease was entered into. But these notes do not extinguish the rent—"The acceptance by a landlord, of a bond for rent, is no extinguishment of the rent, because the rent issuing out of the realty is a debt of as high a nature as a specialty claim." 1 *Chitty's Plead.* 119. It does not appear, that Young parted with the term by assignment after it came to him, so as to discharge himself in any manner.

The covenant contains a promise to pay so much rent quarterly. This covenant in consequence of the privity of estate, bound Young, the assignee of the term.

The declaration sets forth such facts as shew that the plaintiff was entitled to recover; and we think they were substantially proved. We do not perceive any sufficient ground to justify the instruction to find as in case of non-suit.

Judgment reversed, with costs, and cause remanded for a new trial.

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1884.**Jones et al. vs. Tipton.**

Assumpsit.

2d 286  
104 86

[Mr. Apperson for Plaintiffs : Mr. Owaley for Defendant.]

FROM THE CIRCUIT COURT FOR MONTGOMERY COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court. *October 24.*

THE only question deemed essential in this case, is, whether assumpsit for use and occupation, can be maintained by a vendor against his vendee of land, to recover the value of the vendee's use of the land, between the date of the contract of sale, and a virtual rescission of that contract, by a judgment for damages against the vendor, for failing to convey the legal title.

Assumpsit for use and occupation may be maintained, on common law principles, even when there is only an implied contract to pay. *Logan vs Lewis*, 7 J. J. Mar. 3.

But the law will not imply a contract to pay rent when the occupant held as a vendee; because he held the land as his own; and therefore the relation of landlord and tenant, so far as rent may be involved, cannot be inferred; and, consequently, although the contrary doctrine was laid down in the modern case of *Hall vs. Vaughan* in England, it is well settled, in this country, and in England too, as we confidently believe, that, as between vendor and vendee, assumpsit for use and occupation cannot be maintained on an implied contract, because, in such a case, an undertaking to pay rent will not be implied. *Smith vs. Stewart*, 6 Johnson, 46. *Bancroft vs. Wardwell*, 13 Ib. 489. *Vanderheauwel vs. Storrs*, 3 Con. Repts. 208. *Little vs. Pearson*, 7 Pick. 301. *Wheaton's Selwyn*, 549.

Wherefore, as the consequence of this opinion is an affirmance of the judgment of the circuit court, that judgment must be affirmed, without regarding other points presented by the assignment of errors.

Assumpsit, for use and occupation (as between landlord and tenant) may be maintained, even upon an implied contract to pay.—  
But—

A vendor cannot maintain assumpsit against a vendee, for his use of the land, while in possession under a contract of sale, afterwards rescinded. As between them, and in this view, the relation of tenancy does not exist; and the law implies no promise by the vendee, to pay rent.

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CHANCERY.

*Daniel against Ballard.*

[Mr. Caperton for Plaintiff: Mr. Turner for Defendant.]

FROM THE CIRCUIT COURT FOR MADISON COUNTY.

October 24.

Chief Justice ROBERTSON delivered the Opinion of the Court.

One who becomes bound as a surety, at the instance and for the benefit of a co-surety (who afterwards pays the whole debt) is not liable to him, for contribution.

A surety who has paid the whole debt, and goes against a co-surety for contribution, must show the insolvency of the principal, to entitle him to recover.

The answer of a principal debtor, admitting his insolvency, is not evidence of that fact, against a co-defendant—his surety.

This court, upon reversing a decree for want of evidence to sustain it, where there is no defect of parties, will not open the decree for further preparation or proof: but will remand the cause for dismissal, or for

BALLARD, as a co-surety, with Daniel, for Caperton, having paid the whole debt, obtained a decree against Caperton, for one half, and against Daniel for the other moiety thereof; and this writ of error is prosecuted to reverse the decree.

Daniel insists, that he became bound as surety at Ballard's instance, and for Ballard's benefit, and that, moreover, if he be equitably liable to Ballard for contribution to any extent, the decree against him is for too much.

Had Daniel proved, as he alleged in his answer, that he signed the joint obligation at the instance and for the benefit of Ballard, who received to his own use, in payment of a debt which Caperton owed, the whole amount for the loan of which, by the obligee, the joint bond was given, he (Daniel) would not have been liable to make any contribution whatever. For, though the liability of co-sureties to each other, does not result from any contract between them, but from the equitable principle, that the joint burthen should be borne equally by each; nevertheless it is clear, that one is not under any equitable obligation to another, who, for his own benefit, induced him to become a co-surety. But this allegation in Daniel's answer is unsustained by proof. He must therefore be deemed in every respect, a co-surety for Caperton.

The decree against Daniel, is for rather more than a moiety of the sum which had been paid by Ballard.

But there is a much more formidable and comprehensive objection than this, to the decree.



The money paid by Ballard must, *prima facie*, be deemed to have been paid to the use of Caperton, the principal obligor; and, as Daniel's only equitable obligation is that of bearing his equal part of the burthen, and of sharing equally the risk of eventual loss, which devolved on Ballard and himself, as co-sureties, his liability to Ballard is altogether contingent, and depends on Caperton's insolvency *Pearson & Co. vs. Duckham*, 3 *Littell's Rep.* 386. *Poignard vs. Vernon &c.* 1 *Mon.* 47.

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such decree as  
the proof will  
justify.

As against Daniel, there is no proof of Caperton's alleged insolvency. The answer of Caperton is not evidence against Daniel; and his solvency or insolvency is a fact neither charged, nor presumed, to be within Daniel's personal knowledge.

Wherefore, as the record contains no intimation of Caperton's insolvency, excepting the allegation in the bill and the admission in Caperton's answer, the decree against Daniel must be reversed.

As there is no defect of parties, but only a defect of proof to sustain the decree against Daniel, this court cannot open the case for further preparation or proof on either side.

But as Ballard is entitled to restitution of the whole amount which he paid, it is but equitable that the whole decree should be reversed, and the cause remanded, with instructions to render a decree, upon the general prayer for relief, against Caperton, for the whole amount paid by Ballard, as his surety, and to dismiss the bill as to Daniel.

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## INDICTMENT.

## Pryor vs. The Commonwealth.

[Mr. Haggin, Mr. M. C. Johnson and Mr. Marshall for the Plaintiff: Atto. Gen. Morehead for the Commonwealth.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

October 24.

Judge NICHOLAS delivered the Opinion of the Court—in which the Chief Justice, being absent at the hearing, took no part.

The term *money*, in the technical sense of judicial proceedings, means nothing but gold and silver coin. Every penal offence must be proved as laid in the indictment. —A charge, that the def't set up and kept a *farò* bank, at which *money* was bet, lost and won, is not sustained by proof that *bank notes* were bet, lost and won.

THE indictment charges Pryor with setting up and keeping a gaming table, at which the game of chance called *Faro* was played for *money*, and at which *money* was won and lost. The proof was, that *bank notes* were played for, won and lost.

This court has heretofore repeatedly determined, that the term *money*, though it may have a popular import which, in ordinary parlance, means, or at least includes, bank notes; yet, that its true technical import is lawful money of the United States, in other words, gold or silver coin, and when used in judicial proceedings it is always to be taken in this technical sense. This has been so repeatedly decided, that the question ought long ago to have been considered as at rest. Though the betting of bank notes is equally illegal, and would render the defendant liable to the same penalty as the betting of money, yet as the proof must fit the charge as laid, the charge was not made out in this case, and the court ought so to have instructed the jury, at the instance of the defendant. If the charge had been for a betting, winning and losing of bank notes, it would have been no better sustained by proof of a betting, with gold and silver coin.

The right of peremptory challenge, in penal cases (not felonies) extends to three jurors, as in cases strictly civil. 3 J. J. M. 149.

The court, also erred, in refusing the defendant the right of peremptory challenge to the extent of three jurors. It was held in the case of *Montee vs. the Commonwealth*, 3 J. J. Marshall, that the statute was susceptible of a construction, which would allow to the accused such right of peremptory challenge. We still think so.

That case has probably most generally regulated the practice on this subject ever since. That would be a strong reason against retracting the opinion then intimated, even though we felt more doubt than we do of its correctness. The statute is, no doubt, susceptible of a different construction, which would confine its provisions to civil cases. But as no reason of justice or policy can be surmised for allowing such right in a merely civil case, that does not equally require it in these penal proceedings, we cannot presume a legislative intention to make any such discrimination, and if there be an allowable construction, which will prevent it, such construction should be adopted by the court.

Judgment reversed, and cause remanded for a new trial consistent herewith.

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## Davis vs. Young.

TRAVERSE.

[Mr. Ch. A. Wickliffe for Appellant: Mr. Crittenden for Appellee.]

FROM THE CIRCUIT COURT FOR NELSON COUNTY.

The Opinion of the Court in this case—Chief Justice Robertson and Judge Nicholas concurring, Judge Underwood dissenting—was delivered by the Chief Justice, as follows.

October 25.

THIS is a case of forcible entry and detainer, in which Davis, the plaintiff below, having failed, has appealed to this court. The case.

The land in contest was never enclosed, and is included by both the elder patent under which Young holds, and the junior grant under which Davis holds.

The character and extent of the settlements, possessions and claims of the parties respectively.

Each party had resided for many years, and still lives, within the bounds of the patent under which he claims, though the dwelling house of neither of them is, or ever was, on any part of the land common to both grants; but more than seven years prior to the first of January, 1816, Davis' farm had, by a continuous fence, been extended beyond the line of interference, and, as thus ex-

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tended, has, ever since been occupied and cultivated by himself and those from whom he derived his title; and, sometime between 1812 and 1818, Young had also enclosed a part of the interference between the two patents; but had not enclosed any portion of the land now in controversy, until within two years prior to the institution of this proceeding against him.

Among various opinions given by the circuit judge, during the trial, which require no special notice, he decided that the seven years limitation law of 1809, enacted for the protection of actual settlers, could not be made to apply in this case, beneficially to Davis; because his *dwelling house* was not within the boundary of the adversary patent, under which Young claims.

An actual residence upon the land, is indispensable to ensure to the occupant, the protection of the act of 1809, for the speedy adjustment of land claims—"the 7 years law;" so decided, often and invariably. But the precise meaning of the terms 'settlement'—'settle,' as used in that act—what possessions the former term may include—has never been heretofore determined by this court. [Judge Underwood thinks for mer decisions have defined & fixed the meaning of the terms. Dissent: post.]

That opinion presents a point which has never been settled, or directly decided, by this court. When all the cases are collated and scrutinized, it will be seen, that, though this court has invariably decided that *actual residence* is indispensable to the protection assured by the limitation law of 1809, and that an actual settlement, within the contemplation of that statute, should not, as a matter of course, be extended, by construction, to the limits of the occupant's *claim* or *title*—it has never yet conclusively defined, in any other respect, the settlement intended by the statute; nor determined whether the *dwelling house* must be on the disputed land; or whether the occupant should be deemed to be settled on the land claimed by his adversary, whenever his *dwelling house*, though not included within the conflicting claim, is embraced by his own claim, which elsewhere conflicts, and his farm, or other improvements subservient or appertinent to the mansion, and actually used and occupied by him under the same title, shall have been, as long as seven years, according to the statute, on the land claimed by another, under an adverse title.

Review of various cases, upon the seven years' law, with reference to the question, whether the act ap

In *Anderson vs. Turner*, 3 *Marshall*, 131, this court said, respecting Anderson, who was defendant in the circuit court,—“He is, it is true, proven to be *possessed* of the land in contest; but he is not *shown* to have actually settled upon the land included within the claim of

Turner." It is believed that the facts presented in that case, in the circuit court, were, in every essential particular, like those which the record of this case exhibits in this court. But it will be found, by an inspection of the record of that case, in the office of our clerk, that it does not shew, that Anderson's enclosure had been extended, for seven years, within the boundary of Turner's claim; or that, if that important fact could be inferred at all, it was not presented in such a manner as to have authorized this court to take judicial cognizance of it. The bill of exceptions states, that Anderson had purchased from McKee, the grantee of the title which conflicted with Turner's claim, and that he had actually resided, for more than thirty years, within the boundary of his own claim, *but not within the claim of Turner*; and also, that he had been "actually possessed of the land in contest," for about eleven years. The plat returned by the surveyor exhibits some zigzag marks across the line of interference between the conflicting claims, and "*Anderson's field*" is written within those marks. But neither the surveyor, in his report, nor any witness on the trial, explained whether those marks designated a part of Anderson's farm on which he resided; nor does the bill of exceptions contain a particle of evidence as to the time when the field had been cleared or enclosed, or how long, or by whom, it had been occupied. This court could not, therefore, have judicially decided, from such facts, that any part of the land claimed by Turner within Anderson's patent had been enclosed and continually occupied by Anderson, as a part of his residence, for as long a period as seven years prior to the institution of the suit; or even that the field had been actually enclosed before the commencement of the suit. And hence the field is not alluded to in the opinion delivered by the court; and therefore, when the court said that, though Anderson had been in the possession of the land in contest, still there was *no proof* that he had ever been actually settled on it, we should presume that the idea intended to be conveyed by the word "*possession*" was, that there was only a constructive possession, in fact. In many other

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plies when the dwellinghouse of the settler is not upon the part of the land adversely claimed — none of which cases, (as the majority understand them) contain any decision, or intimation, that the act is to be so restricted in its operation.

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Turner, 3 Mar  
13, first examined.

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cases decided by this court, on the same statute, whenever the word "*possessed*" is used, as contra-distinguished from "*settled*," a constructive possession, merely was evidently intended. Nothing else was intended in the case of *Anderson vs. Turner*: first, because the bill of exceptions in that case, did not, as already shewn, prove that there had been a *possessio pedis* for seven years; nor that there had been, for that period, or even for any period prior to Turner's suit, any other than a constructive possession in fact; and, second, because, had the court known that Anderson had held the land in contest, by actual enclosure, connected with his mansion by a continuous fence, or occupied in subservience to it, for a period of more than seven years, we are not allowed to presume or admit, that such a fact would have been passed by without any notice or suggestion whatever, or that the court would have been willing to say, that Anderson had been *possessed*, but not *settled*, without shewing *how* he had been possessed, and why he was not deemed to have been *settled*.

It is well known, that a claimant may be possessed of land, without being actually settled on it; and that an occupant may be in actual possession to the extent of his claim, although his actual enclosure is more circumscribed; and *this obvious distinction was deemed so essential by the legislature, as to be made the basis of the important statute of limitations, of 1809.*

It would have been quite easy and appropriate for the court to have said, in *Anderson vs. Turner*, or in some other of the very many cases which presented the point, that an occupant cannot be settled on his adversary's claim, unless his dwelling house be upon it, *if such had been the opinion of the court.* And such a decision—summary and precise and plain as it would have been, would also have been recommended by the fact, that it would have prevented much doubt and perplexity, known to have existed, as to what the word "*settled*" was designed to mean and comprehend. And, therefore, it is to be presumed, that this court would, in some case, and especially in that of *Anderson vs. Tur-*

ner, have said, at once, that the occupant's dwelling house must be within the limits of his adversary's claim, if such *had been deemed* to be the true exposition of the act of 1809.

But in the case of *Miller vs. Humphreys*, 2 Marsh. 448, the court incidentally said, in effect, that an *extension of the enclosure is an extension of the settlement*, and that the *settler is actually settled to the extent of his actual close*.

And, in *Hite's heirs vs. Shrader*, 3 Litt. 445, the court said:—"The defendant proves, that he has had possession for about ten years before the commencement of this suit; but it appears, that he *settled* outside of the interference between the two claims, and that *no part* of his *enclosure* is within the bounds of the land claimed by the complainants; and, according to the settled construction of the act for the speedy adjustment of land claims, which prescribes the limitation of seven years, for bringing suits for the recovery of land under adverse claims, it only applies to cases where suit is brought for land on which the adverse claimant has been *settled* for seven years." Thus clearly intimating, that an occupant should be deemed to be settled to the extent of his actual enclosure, at least; for, unless such had been the opinion of the court, the declaration that "*no part of (the) enclosure is within the bounds of the land claimed by the complainants,*" was not only useless and unmeaning, but inappropriate and delusive.

But whatever should be inferred from the tenor of the cases of *Anderson vs. Turner*, of *Miller vs. Humphreys*, and of *Hite's heirs vs. Shrader*, the point we are now considering was not *judicially* decided in either of them; and, as there is no other adjudged case in which that point can be deemed to have been *settled*, or directly touched, we are left, without any other guide than the statute itself, to settle definitively and authoritatively, for the first time, its true import and application.

Considering the statute of 1809, so far only as it has not been hitherto authoritatively expounded, and conceding—as has been often decided—that the boundary of the occupant's *claim* is not, merely because it defines the extent of his claim, the boundary, also, of his actu-

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*Hite's Heirs v. Shrader*, 3 Litt. 445, examined

The boundaries of a settler's claim, and of his actual settlement, may be different.—But, as far

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as permanent improvements have been made and used by a *bona fide* settler, in connection with, and subservient to his residence, and within the limits of a claim under which he settled—so far his ‘settlement’ extends; and if such improvements extend into an adversary claim, he must be deemed a settler thereon; and, by adding to his improvements, he may enlarge his settlement: and, when he thus encroaches upon an adversary claim, within the limits of his own, he will be deemed a ‘settler’ upon the interference from the time of the encroachment—when the statute begins to run, and, after 7 years, affords its protection. [Judge U. thinks the first entry of the settler, with title, or his acquisition of title after entry, are the only points, at which the computation of time can commence. — *Discent*—post.]

al settlement on the land so claimed, we are of the opinion, that he should be deemed to be settled to the extent of the permanent improvements made and used by him, in subservience to his residence, and within the limits of the claim under which he settled and lives. All such improvements should be considered, as the occupant considered them, to be integral parts of his settlement or residence; because each is but an incident to, or a consequence of, his habitation, and ministers to his necessities and comforts as an actual occupant, and is equally embraced in the common sense, popular idea of his settlement, or residence, or *home*. Moreover, we cannot believe, that a provident legislature, in enacting a law for securing peace, safety, and repose to those who improve and occupy land within the limits of this Commonwealth, believing that they are settled upon and are improving their own soil, ever intended that the *dwelling house* only, should be protected, and that the *kitchen*, the *smoke house*, the *dairy*, the *barn*, the *corn field*, or even the enclosed woodland pasture, should be unprotected, merely because they may happen to be on one side of a line of a conflicting superior claim, and the mansion house happens to be on the other side of the same line, though all of them are within the boundary of the claim under which the occupant settled, and within which, believing it to be secure, he has, in good faith, been extending his farm and other improvements, in the hope of having a permanent and comfortable *home*, where he might live independently, and enjoy the fruits of his honest toils; but where he could not, and would not, live, if nothing be left to him but the isolated walls of his dwelling house. Such a restricted interpretation of the statute of 1809, would, in our judgment, be not only subversive of the end and policy of its enactment, but irreconcilable with the popular and practical import of its phraseology, and even incompatible with the most technical meaning of the terms—“settled” or *settlement*—*reside* or *residence*.—Why should the dwelling house be alone protected? and why should every other improvement subservient to the dwelling and essential to its enjoyment as the



occupant's home or place of residence, be without the pale of the protecting statute? Why should the legislature have been so solicitous to protect the cabin or other house in which the occupant eats, and have left unprotected, *the field which his labor cleared and enclosed, and which yields his children bread, and to enjoy which he settled himself and built him a shelter?* The idea of home, or of settlement, is more comprehensive and enlarged than the mere walls of the house, or the camp, or the tent, in which the occupant eats and sleeps. According to the most circumscribed import, which it can be reasonably or consistently deemed to have, it is coextensive with the enclosed farm, and is an aggregation of every improvement embraced by the actual close, and subservient to the occupant's comfortable residence. To that extent, at least, he is actually settled; and he should be deemed to be settled equally on every part of the enclosed area, which includes his dwelling house, and which, with all its improvements, is an entirety, properly denominated his settlement, residence, or home. As the circumference of that consecrated area is extended, the settlement is enlarged; and whenever it includes any portion of land claimed under a title adverse to that of the occupant, he should be deemed to be, *eo instanti*, settled within the bounds of the adversary's claim.

The same person can have but one actual settlement, at one and the same time; but that settlement may be more extended or circumscribed at one time than at another time, and may interfere with more than one adversary claimant at the same time, or at different times, without any removal of the occupant's dwelling house. This may all be true, even if his settlement be restricted to the walls of his dwelling. For instance, if, when he first settled, his house was so small, as to encroach on the boundary of only one adversary claimant, and should, therefore, on the hypothesis, that *that house* alone defines the extent of his settlement, be deemed to be settled on one only of the conflicting claims; still, by building another house on the site of the first and of dimensions so much larger as to encroach on other adjoining and con-

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flicting claims, he would then be settled within the bounds of each and all of the claims on which his house is built. And the same may be as truly said of his entire close, if that, and not the walls of his dwelling house, should be deemed the boundary of his settlement. But in each case, there would be only one settlement, though it was of greater or less extent at different times, as the close defining it, was, at one time, or another, more or less circumscribed; just as the occupant himself, though he never lost his personal identity, was larger or smaller, and filled more or less space, at different periods of his life.

Security and encouragement to honest industry, and a consequent incitement to the settlement and improvement of the country, were the leading objects of the statute of 1809; and not only those ends, but the words of the act, should, in our opinion, be deemed to imply, as a matter of course, that the *bona fide* occupant should be secured, at least to the extent of his improvements connected with and subservient to his residence. To that extent, he is actually settled on the land on which he resides, and which he claims as his own, and therefore improved. If he is settled in his house, why is he not also settled on his enclosed farm, on which he built his house, and lives, for the purpose of enjoying the fruits of his agricultural labor? and would he not be settled on the whole farm, *even though he lived on it without any house?*

To constitute an actual settlement upon land, to which there is an adverse, interfering claim, the dwelling house of the settler, or some of the improvements connected with it, must be *upon the lap*: otherwise the adversary claimant has no cause of action, and his right will not be

Actual settlement is a comprehensive term—a *nomen generalissimum*, which includes more than a *dwelling house*. Generally, it should, in the abstract and popular sense, be deemed coextensive with the claim of title, under which the occupant settles on a part, in the name of the whole tract which he claims as his own; and then the entire tract is an indivisible unit, and altogether identifies the settlement.

But so comprehensive an import could not, justly or consistently, be allowed to the term “*actually settled*,” in the statute of 1809, unless the occupant should have built his dwelling house, or extended his actual close, or made other appertinent improvements, within the

limits of the adversary claim, conflicting with that under which he settled.

It was, doubtless, the intention of the legislature, only to substitute, in behalf of actual *bona fide* settlers, a limitation of seven years, for the general limitation of twenty years. And hence, as an adversary claimant of a tract of land, partially interfering with a tract settled on by another claimant, might have no cause of action against the occupant, until, by actual enclosure, or other improvement, he had encroached on some portion of the land embraced within the conflicting boundary, it would not be just or consistent with the purpose of substituting seven for twenty years, to give to the term settlement, or "*settled*," such an import as to make seven years a bar to an entry, when no cause of action had ever occurred. But it would be perfectly just and consistent with the policy of the act of 1809, to give it such an operation, as to protect a *bona fide* settler, to the whole extent of his recorded claim, whenever he had extended the actual close including his dwelling, or made other *appertinent and permanent* improvements, upon the interfering claim, so as to furnish to the adversary claimant sufficient and continued cause of action, for seven years prior to the institution of his suit; and when the adversary claimant had not, also, been, at any time during the seven years, actually possessed of the interference. And this interpretation of the statute, which appears to us to be reasonable and consistent, is fortified by the intimation already quoted, from the case of *Hite's heirs vs. Shxader*, (*supra*.)

There is, as already suggested, an obvious reason for restricting the ordinary and natural import of the term actual settlement, or "*actually settled*," and for giving to it, in cases within the operation of the statute of 1809, an artificial and legal signification more limited in its range. But beyond that reason, we can perceive no sufficient or consistent motive for carrying the restriction; especially, as any other or greater qualification might operate unjustly and inconsistently, and might often pervert the statute, and frustrate its obvious and admitted policy.

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affected. But whenever the settler encroaches upon the lap, it operates as notice to his adversary; who may then bring his suit; and if he fails to do so, for seven years, he will be barred.

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Such a statute should be reasonably construed, and beneficently applied in favor of *bona fide* settlers and improvers; and such a construction and application will not, as we believe, withdraw its protection from the fields, and the garden, and the barn, and the meat house, of the occupant, and, by confining its panoply to the solitary dwelling house, leave it cheerless and destitute, and thus convert it into a prison, rather than the abode of comfort and security.

Review of cases supposed to conflict with the construction given in this opinion, to the 7 years law: viz.

It is said, that the cases of *Bodley vs. Coghill's heirs*, &c. 3 Mar. 615; *Hog vs. Perry*, 1 Litt. Rep. 173; *Smith vs. Nowells*, 2 Litt. Rep. 160, and *May &c. vs. Jones &c.* 4 Litt. Rep. 24, conflict with the interpretation which we give to the statute of 1809. We think otherwise; and will briefly notice these cases, for the purpose of shewing why we so think.

*Bodley v. Coghill's heirs.* 3 Mar. 615—

In the case of *Bodley vs. Coghill's heirs*, there was no proof, that the party claiming the benefit of the statute of 1809, had ever lived upon or near the land of the other party, or even within the bounds of his own conflicting claim; the only proof on that point, was, that he "had entered upon the interference in 1795," and had "held the possession thereof ever since;" and thereupon, this court decided, that there was no proof of any actual settlement on the land; and said, very truly, that, "the possession may have been acquired and continued, by clearing and enclosing, or by other mode of entry upon land, without an actual settlement." Here the court evidently decided, only, that there being no proof of an actual residence within the limits of either of the conflicting claims, a naked possession, even by enclosure, could not, *per se*, amount to an actual settlement. But there is no intimation that, if there had been an actual residence within the bounds of the settler's claim, the occupant, by an extension of the actual close including that settlement, should not have been deemed to be "settled" to the extent of his entire enclosure.

*Hog v. Perry,* 1 Litt. 173—

In *Hog vs. Perry* the court said:—"There is proof of clearing or improving and cultivating the soil; but no actual settlement or residence is shewn during the whole seven years next preceding the commencement of this ac-

tion. *On the contrary*, this cultivation of the soil, or use of the land, was *interrupted* for several years, *part of the seven*, and *nobody used the land*, except that the appellees kept up a continual claim there." Surely there is not a word in that case relating, in the remotest degree, to the point we are considering.

In *Smith vs. Nowells*, it appeared, that there had been no settlement on the land in contest, by the party claiming the protection of the statute of 1809; but a tenant of that party had been permitted to clear and enclose a field within the interference of the conflicting claims, which, after being occupied for less than seven years, by the tenant, had been abandoned, and deprived of its enclosure. The court then said:—"It also appeared that the defendants had, for some years, lived, and still live, within the boundaries of the patent under which they claim, but outside of the interference with that of the lessor of the plaintiff, and that the *improvements, where they settled*, were not upon the interference." And, in that state of case, the court decided that the circuit court erred in instructing the jury to find for the defendants, if they had "*either settled upon or taken possession of the land*" claimed by the plaintiff, and had continued so possessed for seven years; and assigned, for that obviously correct decision, the following reason:—"The jury, according to the instruction given by the court, would have been bound to find for the defendants, although they might have obtained the possession by entry upon the land, or enclosing it, without any actual settlement upon it:" meaning only, by the latter part of the sentence, that the clearing and enclosing of the field by the tenant, unconnected as it was, with the residence of the landlord, was not an actual settlement by the latter; and that, by merely *thus* acquiring possession, he could not be deemed to have been actually settled on the land in contest. Thus it is perfectly evident, that there is nothing in that opinion repugnant to our interpretation of the statute. But, on the contrary, there is an indirect implication in support of it. For the court said that, "*the improvements, where they settled, were not upon the interference*:"

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Smith v. Nowells, 2 Littell, 160—

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*May's heirs v. Jones &c.* 4 *Litt.* 124—and conclusion that the cases of *Hite's heirs v. Shrader, Miller v. Humphreys, and Smith v. Nowells*, favor the construction now given to the act, while there is no case containing even an intimation, conflicting with it. [Judge U. takes a different view of the cases.—*Dissent: post.*]

Where different settlers, under interfering claims to the same land, have improvements, united with their residences, upon the lap, and the possession of neither has been interrupted by the other, within 7 years—the extent of the possession of each will depend on his title and other facts to be proved.

Erroneous instructions are cause for reversal, notwithstanding the verdict may be such as it ought to have been,

thereby intimating, that the improvements and the settlement with which they were connected, were commensurable.

In *May &c. vs. Jones &c.*, there was proof tending to shew, that the actual residence had not been continued for seven years, although the possession acquired by the settlement had never been interrupted; and the court therefore said, “there may have been a continued possession of the land for seven years, without an actual residence thereon, during that time.”

Thus we have not been able to find any adjudged case, which contains even an intimation against our construction of the statute; and, it is evident that the cases of *Hite's heirs vs. Shrader* and *Miller vs. Humphreys*, fortified by that of *Smith vs. Nowells*, favor that interpretation.

Then, considering the phraseology, reason, and object of the statute, and all the adjudged cases, its true interpretation must, we think, protect against an antagonist claim, an occupant of the designated class, who shall have made and continued for seven years, within the bounds of the interference between the conflicting claims, any permanent improvement connected with his residence on his own interfering claim and subservient to its comfortable enjoyment as his home:—unless the adversary claimant shall, within that period, have been also settled on the interference, claiming it as his own land; or shall have done something else to interrupt or change the possession; and then the character and extent of each occupant's possession would be determined by the titles and other facts proved on the trial.

Wherefore, it appears that the circuit judge erred, so far as the opinion which he gave to the jury differed from the exposition of the statute of 1809, which we have now just given.

But the counsel for the appellee has argued, that the judgment should be affirmed, because, as he insisted, the proof entitled his client to a verdict, even had the circuit court given to the jury, the correct, instead of an incorrect, exposition of the statute.

What, according to a proper construction of the law

and the facts, the verdict ought to have been, we shall not now enquire; because any opinion we might express on that point, would be altogether extra-judicial; for this court cannot know how the jury would have found, had there been no erroneous instruction; nor can we know, that the error in the opinion of the circuit judge did not operate to the prejudice of the appellant.

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Whether, by entering on the land in contest, the appellee interrupted the continuity of the appellant's possession, prior to 1816; or whether the appellee had extended his enclosure, as he attempted to prove, across the line of interference, prior to 1816; or whether, in 1812 or 13, when a conveyance was made to him by Chin, it was understood between the appellant and himself, that he should hold the land so conveyed, and that the appellant's possession should not longer be construed to extend beyond his actual enclosure, and which may be proved by parol testimony, or inferred from parol facts, without violating the statute of frauds and perjuries—are all questions which the jury had a right to decide from the evidence; and respecting which, as there will be another trial, this court will intimate no opinion.

Judgment reversed, and cause remanded for a new trial—Judge Underwood dissenting.

JUDGE UNDERWOOD, unable to concur with the other members of the Court, in the foregoing Opinion and Decision, presented his views upon the points of difference, in the following Dissent.

UNABLE to concur with my brethren in the opinion delivered, I deem it necessary to give my views as to the true meaning of the act of 1809, entitled "an act to compel the speedy adjustment of land claims," so far as it applies to the present case. DISSENT.

The first and second sections of the act are the only two which need be considered; and the first remark which I deem it important to make, is this; that the first section was intended to protect settlers "before the passage of the act," and the second section was intended

The meaning of the terms 'settler'—'settlement,' as used in the Kentucky statutes generally, discussed.

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to protect those who might thereafter settle on land." There is some difference in the language used in the sections, and they might be differently interpreted were it not, that the general scope and policy of the act forbids the idea that the legislature contemplated taking the distinction between a previous and after settler, in such manner as to put the latter upon a more favorable footing than the former. If there be a difference in the construction of the two sections, the after settler would meet with a more liberal protection than the previous settler. Such a difference would be altogether unreasonable: because, if any preference was given, it would, under the legislative motive disclosed in the preamble, most likely fall to that class whose labors had earliest contributed to redeem the country from its wilderness condition, and who, at the time of their settling, had fewer means of ascertaining the position of the various interfering claims, which covered their land, or parts of it. I shall, therefore, regard both sections as meaning to afford protection, upon the same terms, to the previous and after settler.

The nature and extent of the protection, which the statute intended, will, I think, be very plain, if we attend to its language, and give proper effect to the terms *settler* and *settlement*, which, in our land law, have a technical meaning.

The Virginia and Kentucky statutes, passed for the purpose of appropriating the vacant, public domain, regarded the country as a vast wilderness. The design of the legislature, in granting lands to *settlers*, or in granting *settlement rights*, was to have the country improved, and filled with a thriving, happy population. The *settler*, by legislation, was to have a *settlement right* granted to him. Who was the *settler*? I answer, the man who penetrated the wilderness in pursuit of a future residence, and having found a place suited to his wishes or necessity, there stopped, ceased his rambles, and began to improve, with a view to a permanent home. He was a *settler* from the time he built his *half-faced* camp, or erected his tent, provided he did it with the intention of remaining and living at that spot. Thus locat-



ing himself upon land, and continuing to reside thereon the time required, he might obtain from the proper authorities, the grant of a *settlement right*: to wit, a certificate allowing him to appropriate so much land, including the place where he *settled*, meaning where he stopped, and where he put up the first rude camp or cabin, to shelter himself from the weather, and where he resided the requisite length of time. If, as suggested in argument, he located himself in a hollow tree, and commenced improving, with a view to a permanent residence, the tree would answer all the purposes of a camp or a cabin, to designate the spot where he *settled*. The term *settlement* is sometimes, in common parlance, used to designate the *settlement right*, or number of acres granted to the settler, in consideration of his settling, and remaining the requisite time, upon the land. And in that sense, it may sometimes be used in legislative and judicial proceedings. Thus A B's *settlement*, or *preemption*, means the four hundred, or the thousand acres, granted to him. But the term *settlement*, as used in the first and second sections of the act under consideration, means nothing more nor less, than the locating oneself upon the land, with a view to make a permanent residence, and manifesting that intention, by preparing the hollow tree for shelter, or by erecting the camp or cabin, and living in it. This will be manifest by considering another matter: to wit, the different circumstances which must exist, or the ingredients essential, to constitute the protection of the settler, under the provisions of the statute.

*First*: the settler must have a connected title, in law or equity, deducible of record from the commonwealth. *Secondly*: he must be an actual settler upon the land embraced by his legal or equitable title. *Thirdly*: such actual settlement or residence upon the land, must be continued for the term of seven years, during which time the title, legal or equitable, must abide in him—unless he is aided by the relation subsisting between vendor and vendee. The concurrence of these things constitute the shield which the statute has

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The statute begins to run from the time the settler entered on the land, when he entered with title, and from the time when he acquired the title, if he had previously entered without one. The extension, afterwards, of the improvements connected with his dwelling house, into the limits of an adversary claim, will not make him a settler upon it, within the meaning of the act. [The other two judges contra—*Ante* 308.]

furnished. From what time shall it avail? or from what time shall the limitation begin to run? There are two answers for the question: *first*, from the date or commencement of the actual settlement, where the settler has title when he enters on the land. But if he have no title, then, *secondly*, from the time he acquires title including his actual settlement. The first answer, and which is founded on the first section of the act shews clearly, that the limitation runs from the day that the settler located himself. The second answer, founded on the second section, shews that the limitation runs from the acquisition of title. There is in neither section, any expression which holds out the idea, that the limitation can begin to run from any other period, for any part of the land claimed by the settler; and yet, under the opinion delivered, there is a limitation of seven years, commencing—not at the time the actual settler first establishes himself upon the land under title, nor at the time he acquires title, if he settles before he has any—but, from the time he extends his *improvement*, his enclosures, over the line of the adversary entry, survey or patent. To my mind, such a construction is equivalent to an interpolation providing for a third class of cases nowhere mentioned in the statute. The error results from confounding the term *settlement* with *improvement*, and regarding the enlargement of a man's fields around his dwelling place, as the enlargement of his actual settlement, or the making of a new settlement, within the protection contemplated by the statute.

I can find no pretext in the statute, for considering the place of the first actual settlement a focal point, from which the old or new settlements may radiate to all points of the compass, and invade A's patent, on the north, B's, on the south, C's and D's, on the east and west, so as to divest each of them of their right of entry, after the lapse of seven years adverse possession, when the settler's actual location, in the beginning, was not within the bounds of either of their claims, and when the settler has continued to reside or dwell on the outside of their lines. The construction by which a

man is made an actual settler on four, or forty, different and distant patents, when the dwelling houses, covering the spot where his first camp or cabin was erected, and in which he has all-along continued to reside, are upon neither, is an interpretation of the statute (to quote the language of the opinion) "subversive of the end and policy of its enactment, and irreconcilable with the popular and practical import of its phraseology." The object of the statute was, to secure the home—the dwelling, of the settler and his family, and to prevent his being "cast out naked to the world." This object is clearly expressed in the preamble. It was never intended to enable the settler, by the extension of his fences, and trespassing upon the land of others, to divest them of their right of entry, upon seven, instead of twenty years, adverse possession, unaccompanied by actual residence upon the land.

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It seems to me, that this question will be placed beyond the possibility of a doubt, by an attentive consideration of the language of the first section of the act. That section declares in substance that, "no action at law, bill in equity, or other process, shall be commenced by any person claiming land under an adverse interfering entry, survey or patent, whereby to recover the possession from any person actually settled thereon, &c." Now, unless the actual settler is settled upon the adverse claim about to be asserted, there is no prohibition to the institution of suit. Let it be borne in mind, that the *actual settlement* means place of residence, according to various judicial interpretations and decisions, and then, I ask, how is it possible, under this statute, to prevent the adverse claimant, having the better title, from asserting it successfully, if the occupant does not reside within its bonds? That *actual settlement*, and residence, are the same thing, is proved by the consideration, that if they were not, then possession by improvements alone, without residence, continued for seven years, would afford protection under the statute. No case can be found where the protection has been given without actual residence upon the land sued for; and it will be seen in the sequel, that such residence

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is indispensable to toll the right of entry, under the act of 1809. The opinion delivered concedes, that actual settlement is essential, but makes it out by an extension of the improvement across the line; now if actual settlement and residence be the same thing, and it be indispensable to reside on the land which is sued for, in order to defeat the claimant, can it be possible, by extending the improvement over the line, to extend the actual residence over the line? A man, by extending his improvements in every direction around his dwelling, may invade various tracts patented to others, but because he does that, can it be said with propriety, that he resides upon, or is actually settled on, the land of each patent? The thing is impossible. There is no way to avoid the force of the argument, except by shewing, that actual settlement is one thing, and actual residence another, within the meaning of the statute; or by going still further on the idea of extending improvements, and making a man's actual residence coextensive with the limits of his enclosures around the domicile; and thus confer upon him the character of an actual settler, or resident, upon the adverse patents, merely because he has enclosed parts of them. Such a construction, I confess, violates all my ideas of the meaning of the terms *actual settler*. A has a patent for a thousand acres, and the question is, whether B is actually settled upon it. It is proved, that, when B first came to the country, he camped half a mile from A's highest line, built his cabin where he camped, and afterwards erected a splendid mansion upon the site of the cabin, and has lived and resided in this camp, cabin and mansion, from the time he stopped travelling; yet, under the opinion, if he extends his enclosures connected with the dwelling house, over A's line, he instantly becomes an actual settler, or resident, upon the land of A, and, if not sued within seven years, it divests A of his right of entry. Is not this conferring on B a sort of legal ubiquity? It makes him an actual settler, or resident, at two distinct places, and upon two distinct patents at one and the same time.

The main argument, in support of the doctrines of the opinion, rests upon the supposition, that the legislature did not intend to protect the domicile alone—which would be useless, if all the adjacent fields, orchards and pastures were recovered by an adverse claimant. I cannot perceive the basis of the supposition. We know that, in practice, the statute has been the means of protecting hundreds and thousands of occupants, and securing to them, not only their domicils, but large portions of land likewise. The legislature did not look to extreme cases; the general condition of the country was surveyed by the legislative eye, and then legislative wisdom prescribed a rule suited to the general condition. The rule was, if the claimant of the paramount title permitted any one to settle within the bounds of his entry, survey, or patent, and remain so settled for seven years, the owner of the superior title should not, thereafter, recover, provided the settler had a claim, or title, deducible from the records of the commonwealth. The paramount title holder may well complain of surprise, if his land is taken from him, not in virtue of an actual settlement in fact upon his claim, but in consequence of a constructive actual settlement, growing out of the extension of fences. If the actual settler happens to locate himself and his houses on a few acres covered by no other claim than his own, and all the rest of his claim is covered by superior adverse titles, so that he loses all the land, except the few acres on which the houses stand, I admit that he might find much difficulty in supporting himself and family upon the premises left. But the legislature have not prescribed the rule in reference to such an extreme case. The rule has been made to turn upon the fact, whether the actual settlement, the place of original location, is upon the adverse interfering claim, or off of it. The present is not an extreme case; and I do not look upon it as proper to strain the obvious construction of a statute, to make it embrace a supposed possible case of hardship.

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It is suggested, that it would be very hard on the occupant, to permit the adverse claimant to recover the

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kitchen, smoke house &c. provided his line run between them and the dwelling house. I do not feel myself at liberty to depart from a plain statutory rule, to save hard cases. There is a difference, however, between houses appertinent to the mansion, and a distant enclosure; and were it conceded, that the smoke house and kitchen constituted a part of the actual settlement, it would by no means follow that a distant corn field was a portion of the actual settlement, or residence, within the meaning of the statute. A case may be supposed, where the line of the paramount adverse claim might run between the bed and fire place: and, in such case, it might be asked, is not the occupant actually settled on both sides the line? I concede it: for an actual settler cannot be restricted to a mere ideal point. His settlement, or what is the same, his residence, must have length and breadth; but because it must of necessity cover more space than the ground he stands upon, I cannot find in that circumstance, sufficient reason to extend it, by construction, to the limits of his enclosures.

Examination of the record and opinion in *Anderson v. Turner*, with which (as Judge U. understands it,) the opinion of the majority is in conflict. *Ante* 300.]

The foregoing view of the subject grows out of my understanding of the legislation of the country, and of the meaning of the terms *actual settler* and *settlement*, in various statutes for appropriating vacant land, beginning as far back as the Virginia act of 1779. But I regard the question now made, as having been determined by this court, in the case of *Anderson vs. Turner*, 3 *Marsh.* 131. That suit was instituted a few years only, after the act of 1809 took effect, and was decided in 1820, Fall Term. I have examined the original record, and I find that—"It was admitted, that the defendant had purchased of McKee, and that McKee's patent issued in 1794, covered the land in controversy; and under that title, defendant has been actually possessed of the land in controversy ever since before the first day of January, 1808; and it was also proven, that he had been living on part of the said land, but not the part in controversy, upwards of thirty years." I copy from the bill of exceptions. The plaintiff gave in evidence, the surveyor's report and connected plat, which show-

ed how the patents, under which the parties severally claimed, interfered. The position of Anderson's house and spring are laid down, and then there are zigzag parallel lines, or marks with a pen, extending from towards Anderson's house and spring, into the patent bounds of Turner's claim, and closed in Turner's claim, by running the same kind of line or mark from the end of one of the lines running into his patent, to the end of the other. Within the space included by these zigzag lines, and the western line of Turner's patent, the surveyor has written "pt. Anderson's field." These are the facts; and upon them, the court says:—"He (Anderson) is, it is true, proven to be possessed of the land in contest; but he is not shewn to have *actually settled* upon the land included within the claim of Turner, and it is only in cases of such a settlement, that the act can have any operation." We perceive from the facts, that Anderson had actual possession, inside of Turner's lines, from January, 1808; the suit was commenced in 1819; so that his possession was of eleven years duration, inside the lines of the patent, under which Turner claimed. Now, if the jury could reasonably have inferred from the evidence, that Anderson's possession was the result of an actual enclosure, and that such enclosure was an extension of the fences from the curtilage around the dwelling house, then, under the doctrines of the opinion delivered, Anderson was shewn to have been *actually settled* upon the land in contest. It seems to me, that it is impossible from the facts, to doubt the correctness of such conclusion, and that the jury were warranted in making it. The surveyor noted *part* of Anderson's field inside Turner's claim; and if it was only a *part*, the residue was across Turner's line, towards Anderson's house, and so shown to be situated by the zigzag lines, representing the fences. That the improvement was continuous, from the dwelling house, over upon Turner's patent boundary, is the rational deduction from the fact, that the parallel lines are not closed from their ends next the dwelling house—having been left open, no doubt to show, that the fields extended in that direction so far as would include the spring and

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dwelling. It would be preposterous to suppose, that the field noted on the plat by the surveyor, and of which Anderson was proved to have been possessed for eleven years, was not enclosed by fences. If it had been an unenclosed waste, Turner might have entered upon it, without suit. With such facts before them, furnishing the foundation for such deductions, the former judges of this court decided, that the act of 1809 did not protect Anderson, because he was not *actually settled* upon the land claimed by Turner. If the extension of the improvement from the dwelling, where Anderson had been living thirty years, over the line of Turner, was the extension of Anderson's *actual settlement*, he ought to have been protected, and the court were wrong, if the opinion now delivered is right. But the court determined, that Anderson was not an *actual settler* upon Turner's claim, for it was shown, that he had *lived* for thirty years out side of Turner's lines, and therefore, he could not be an *actual settler* within his lines.

To my mind, the opinion delivered conflicts with the decision in the case of Anderson *vs.* Turner, but even if they could be reconciled, by a criticism on the manner in which the facts are presented by the bill of exceptions, there are other cases with which the opinion delivered cannot be reconciled. I shall refer to some of the first cases, to prove, that *actual settlement*, and *residence*, are the same thing, within the meaning of the act of 1809, and also, to prove, that the possession which protects a defendant, under the statute, must be gained by actual settlement or residence within the lap, and not by improvement of any other description.

View of the cases of—Bodley  
v. Coghill's heirs.  
3 Mar. 615—

In the case of *Bodley vs. Coghill's heirs*, 3 Marsh. 615, the court says, "that statute (to wit—the act of 1809,) only operates as a bar to an action brought to recover the possession of land on which another has been actually settled for the time prescribed by the statute. But the agreed case does not state, that there was such an actual settlement, and the possession of the defendant may have been acquired and continued by clearing and enclosing, or by other mode of entry upon the land, without an actual settlement."



In the case of *Hog vs. Perry*, 1 *Litt. Rep.* 173, the court say, "possession alone, without residence, or without settlement and occupancy, cannot sustain the bar." "There is proof of clearing, or improving and cultivating the soil, but no actual settlement or residence is shown &c."

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*Hog v. Perry*,  
1 *Litt.* 73—

In the case of *Smith vs. Nowells*, 2 *Litt. Rep.* 160, the court say, "the act of 1809, to compel the speedy adjustment of land claims, which limits the time to recover land to seven years, has been construed to apply, only to those cases in which the possession has been acquired and continued by an actual settlement upon the land, and not to those in which the possession has been obtained by entry upon the land, or enclosing it with a fence, or otherwise." In the opinion delivered, the court have applied the protection of the statute to a possession acquired, not by "actual settlement upon the land" but to a possession acquired by "enclosing it with a fence."

*Smith v. Nowells*, 2 *Littell*,  
160—

In the case of *May's heirs vs. Jones &c*, 4 *Litt. Rep.* 24, and in which I was counsel for the appellees, in the circuit court, the court say, "according to the most obvious import of the act, there must have been an actual residence on the land in contest, for the time prescribed in the act, to authorize the jury to find for the appellees, under the operation of the act." Henceforth, however, in direct violation of the principle here laid down, defendants may protect themselves, under the opinion delivered, without any actual residence on the land in contest, but by the possession of a field upon the land in contest, which is connected by continuous fences, with the enclosures around the actual residence, situated off the land in contest. Whatever may be said about the facts of the cases from which I have quoted the language of the court, with a view to show that the court ought not to have used such language; it is nevertheless clear, that the language, as used, evidences the sense of the court that an actual residence on the land in contest is essential to constitute the bar. I cannot comprehend that reasoning which makes a man's actual residence at a

*May's heirs v. Jones &c.* 4 *Litt.* 24—and conclusion, that these cases and others of later date, prove that the settlement and residence of a defendant must be on that part of his land with which an adversary claim interferes, to authorize him to rely upon the seven years law for his protection; and that these cases are in conflict with the opinion of the court, in this case.

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place, other than where his houses are, and to make a man, by construction, an *actual settler* all over a thousand or ten thousand acres of land, seems to me to be a total perversion of the right use of language.

I deem it useless to follow up later cases. They all harmonize, and taken altogether, prove that actual settlement, and actual residence, are the same thing, and that it must be upon the claim of the plaintiff at law, or complainant in chancery, before his right of entry can be tolled, or right of action destroyed, by seven years adverse possession. Before the passage of the act of 1809, twenty years continued, adverse possession, with or without residence, or actual settlement on the land in dispute, tolled the right of entry. The legislature intended to alter this rule, so far as it related to actual settlers on the land in contest, and to toll the paramount claimant's right of entry, by seven instead of twenty years continued adverse possession, where the settlement or residence was situated on the land in controversy. I had considered these doctrines fixed. I now look upon them as overturned, and have discharged an unpleasant duty in protesting against it.

Remarks on the  
case of Hite's  
heirs v. Shrader.

It is supposed, that an inference may be drawn from the language of the court in the case of *Hite's heirs vs. Shrader*, 3 *Litt. Rep.* 446, favorable to the opinion now delivered. In that case, it is said, that Shrader, "settled out side of the interference, and that no part of his enclosure is within the bounds of the land claimed by the complainants; and according to the settled construction of the act, it only applies to cases where suit is brought for land on which the adverse claimant has been *settled* for seven years." I think the court intended by this language to show, that there was no pretext to apply the limitation of seven years, for the protection of Shrader. As there was neither settlement, nor enclosure, there was no ground for argument, and the court disposed of the case by declaring, that the statute had no application. If any inference can be drawn from the case, it is unfavorable to the doctrine now asserted, in the opinion delivered, because the court say, "Shrader settled outside the interference," and conclude

by saying that the statute only applies to cases where suit is brought for land on which the adverse claimant has been *settled* for seven years;" thereby obviously intimating, that a settler out side of the interference, cannot become a settler within the interference, so long as his actual residence or domicile remains and continues where he first located himself.

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## Violet vs. Violet.

EJECTMENT.

[Mr. Monroe for Plaintiff: Mr. Crittenden for Defendant:]

FROM THE CIRCUIT COURT FOR HENRY COUNTY.

Judge NICHOLAS delivered the Opinion of the Court:

October 25.

THIS writ of error is prosecuted by Joseph W. Violet, to a judgment in ejectment, rendered against him, in favor of Joseph Violet, as lessor of the plaintiff. Statement of the case.

It appeared in proof on the trial, that John Violet, having the title to a tract of land, sold and conveyed it to his son, Joseph W. Violet, who took possession, and has held it ever since, claiming it as his own.

Subsequent to this sale and conveyance, the execution of a judgment creditor of John Violet was levied on the land, as his property, and it was sold and conveyed by the sheriff, to the lessor of the plaintiff; who, immediately after this sale, and before the sheriff had made him a conveyance, gave a bond, binding himself to convey the land to John Violet, so soon as the sheriff made him a deed.

After the death of John Violet, his son, Talbott Violet, purchased out the interest of all the other heirs of his father (except the defendant Joseph W.) in this bond, and, with their assent and that of the lessor of the plaintiff, instituted this suit for the recovery of the

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land, for his (Talbot Violett's) use and benefit, and to be conducted at his costs and charges.

i There was also, testimony conducing to prove, that the conveyance from John to Joseph W. Violett, was made by John for the purpose of defrauding his creditors; that the defendant knew of and participated in the fraud, and that there was no sufficient, valuable consideration therefor.

The defendant introduced evidence conducing to prove the converse of all this: that is, that the conveyance was *bona fide*, and without fraud, and that if there was any fraudulent intent on the part of John, he the defendant was ignorant thereof, and did not participate therein.

A grantor may make a deed with an intent to defraud creditors: yet, if it is upon a fair *bona fide* consideration, to one who had no participation in, or knowledge of, the grantor's fraudulent intent, it will be good and valid.

The defendant moved the court to instruct the jury, that if they believed John sold to Joseph W. for the purpose of defrauding his creditors, yet if they believed that Joseph W. knew nothing of the fraud, and did not participate in it, that then the deed from John to Joseph W. was not void on account of the fraudulent intention of John. This instruction the court refused to give; and, at the instance of the plaintiff, instructed the jury, that if they believed the deed from John to Joseph W. was made by John, with a view to defraud his creditors, the possession of Joseph W. under said deed, was not such an adverse possession, as to enable him to protect himself under the act against champerty and maintenance—whether Joseph W. at the time of his purchase and deed from John, knew of the fraudulent intention of John and participated in the same, or not.

The instruction as asked by the plaintiff, may not be such as the court was bound to give; because it is not based upon the qualification, that the jury should believe, that Joseph W. had paid, or agreed to pay, a fair and *bona fide* consideration for the land. But as the instruction given contains no qualification, that he had not so paid, or agreed to pay, refusing the one, and giving the other, was tantamount to an instruction, that, though he had paid, or agreed to pay, a fair and *bona fide* consideration, the deed was nevertheless void, if

made with a fraudulent intent on the part of the grantor; though the grantee had no knowledge of that intent, nor participated therein. The reverse of this proposition we deem to be the law. It would be a most literal, rigorous and unwarrantable construction of the statute against fraudulent conveyances, to make fair and *bona fide* purchasers the victims of an undivulged or unascertained fraudulent intention on the part of their vendors. Where a fair equivalent is received by a debtor for the sale and transfer of his property, he is not disabling himself thereby from the payment of his debts, and in legal estimation no prejudice can thence ensue to his creditors. The protection of *bona fide* purchasers is as much the object of the act, as the protection of creditors; and it would not be consonant with its spirit or policy, to make either the victims of an over anxiety to protect the others.

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The court also refused to instruct the jury, that the defendant could protect himself from a recovery, under the champerty act, except with a qualification, that they should believe the conveyance from John, to Joseph W. Violett was free from fraud.

It may be, that the defendant in an execution, who is himself in possession, does not hold adversely to the purchaser thereunder, within the meaning of the champerty act, so as to preclude the latter from selling to a third person, before he has recovered the possession. But *this* is not precisely the attitude of a fraudulent vendee, who is in possession, holding the property as his own. Though the law allows the sale of property so held, under execution, yet we do not see the process by which such a holding can be converted into an amicable possession, as between the purchaser under execution, and the fraudulent vendee. It may be true, that the fraudulent vendee stands so far in the shoes of the defendant in the execution, that, after the establishment of the fraud, he would not be permitted to protect himself against the purchaser, by the exhibition of an outstanding paramount title; but still there is the preliminary question, whether he be a fraudulent vendee or not,

The title of the defendant in an ex'on, to land in the adverse possession of a stranger, may be sold by the sheriff.—(Dana, 211.—But, to sales by a purchaser under the ex'on, the champerty act applies: and he can neither convey the land, while the adverse possession continues, nor make any champerty contract concerning it.

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which is the very gist of the litigation as between him and the purchaser. We perceive no reason, either of necessity or policy, for allowing the purchaser to vend the right to make this litigation, or to make a champertous contract concerning it. Neither his interests, nor those of creditors, necessarily require that he should be permitted to make such sale or contract. It is sufficient that he himself is allowed to litigate the question with the vendee, who cannot well be deemed to hold otherwise than adversarily towards him.

Tho' it may be unconstitutional to declare the title of the parties to a champertous contract, forfeited to the state, for the benefit of an adverse occupant: yet there can be no doubt of the power of the legislature to authorize an investigation of the circumstances under which a suit is commenced and carried on; and to ascertain for whose benefit it really is, and to withhold the right of recovery, where it appears to be founded on a champerty contract.

Such being the character of the defendant's possession, the contracts and arrangements between Talbott Violett, his co-heirs and the lessor of the plaintiff, for the institution of this suit, and carrying it on at his costs and charges, for his benefit, come strictly within the provisions of the second section of the champerty act of 1824; and if made out to the satisfaction of the jury, must preclude any recovery in this action. For though it may not lie within the legislative competency, to forfeit the right and title of the parties to the champertous contract, and vest it in the commonwealth, for the benefit of the defendant, in the manner contemplated by that act, still, it may have been strictly within the legislative power, to declare, as is done in the second and third sections, that no recovery should be had under such circumstances. We cannot doubt the power of the legislature, to authorize the investigation of the fact, for whose benefit, and under what circumstances, the suit is really prosecuted, and when ascertained to be under a champertous contract in violation of law, to refuse redress. If it be competent for the legislature to prohibit the vending of pretended titles, or the making of champertous contracts concerning them, which no one would controvert, it surely can refuse the aid of our courts of justice, in carrying into effect such sales and contracts, for the benefit of the parties to them. It is unnecessary, in this case, to determine whether the fact of Joseph Violett having made the champertous contract with Talbott Violett, for the institution and prosecution of this suit, has so far vitiated his title, as to bar a recovery.

ry thereon, in any suit, hereafter instituted, untainted with such illegal arrangement. It may constitute a question worthy of consideration, whether the legislature could, by any mere act of its own, forfeit the vendor's right of suing on his title, for his attempt to sell it, or for a champerty contract concerning it, in violation of law. But we do not think there can be even plausible ground for doubting the legislative power to deny the aid of our courts of justice to champertors, in effectuating their champertous agreements, whether suing in their own names, or in those of others for their benefit. They derive no right or interest under such agreement, that can be deemed worthy of the constitutional safeguard and protection. They, in truth, acquire no right or interest whatever. Their efforts to do so are merely abortive. The law renders all such agreements utterly null and void. It would illy become the violators of the law, to appeal to the law for its protection in the very act of its violation. If the vendor, or holder of the title, who has made a contract concerning it, in violation of the second section of the act, has any remaining interest left in him, that can be legally asserted in the prosecution of a suit for its recovery, it must be in a suit prosecuted by himself, at his own proper costs and charges, and without any taint of a champertous bargain with a third person.

Judgment reversed, with costs, and cause remanded with instructions for a new trial and further proceedings consistent herewith.

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CHANCERY.

*Cameron against Bell and Chiles.*

[Mr. Haggin and Mr. Crittenden for Appellant : Mr. Monroe for Appellees.]

FROM THE CIRCUIT COURT FOR SHELBY COUNTY.

October 27.

Chief Justice ROBERTSON delivered the Opinion of the Court.

B sells land—first to I. and H., then to C; who pays \$50 down, and gives his note for \$100, which B agrees shall not be paid unless the sale to I. and H. was cancelled; it was not cancelled, and C purchased I.'s interest. Suit is brought on C's note for \$100, and he defeats the action, upon those facts. The agreement, as construed here, authorized B to retain the \$50, and C to retain the title B had conveyed to him; and held, that there is no ground for a rescission of the contract.

Courts of equity cannot reverse judgments at law, to correct unjust or improper verdicts. The remedy, in such a case, is to be sought in the Court of Appeals. The judgment must be deemed right & just until it is reversed.

SAMUEL BELL, holding an undivided fourth part of a tract of land, on which Archibald Cameron was living, under an adverse claim, sold and conveyed his interest to Cameron, for one hundred and fifty dollars; one third of which was paid at the date of the contract, and for the residue, Cameron gave his promissory note.

On that note Thomas C. Chiles, as assignee of Bell, sued Cameron; but was defeated, on the ground that, as the jury believed from the proof on the trial, the hundred dollars were not, by the terms of the agreement, to be paid, unless Bell had, prior to his sale to Cameron, cancelled a previous sale of the same interest in the land to Lynch and Haslet, and that there had been no such cancellation of that contract.

Bell and Chiles then filed a bill in chancery against Cameron, for a restitution of the title which Bell had conveyed to him, or for other appropriate relief, for the benefit of Chiles, to whom, as the bill alleged, Bell had transferred all his equity.

Cameron resisted a decree, in any shape, against him; and shewed that he had, since the date of his purchase from Bell, obtained a transfer from Lynch, of his interest under the contract between Bell and himself and Haslet.

On the hearing, the circuit court decreed, that Cameron should convey to Chiles, all the interest which he had acquired by the conveyance from Bell, whenever the fifty dollars which he had paid to Bell, should be refunded, with the accruing interest.

Cameron now claims a reversal of that decree.

We are unable to perceive any sufficient ground for the decree.



If, as Cameron alleges, and as the jury must have decided, and as we would be inclined, without such decision, to infer from the record, imperfectly and obscurely as it exhibits the facts, Bell was to have only the fifty dollars, unless he had rescinded his contract with Lynch and Haslet, and he had not rescinded it,—then Cameron had a right to hold the interest conveyed by Bell, without making any other payment, and had to look to Lynch and Haslet for a perfection of his title by a sale of their equitable interest.

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*Bell &c.*

But, even if such had not been the contract, and if the jury found an unjust and erroneous verdict in favor of Cameron, such a circumstance could not entitle Bell, or his assignee, to a reconveyance from Cameron, or to any other relief in equity. If Bell had a right to the hundred dollars, and Cameron unjustly withheld payment, or improperly defeated the action on his note, still, even that did not entitle Bell to a rescission of an executed agreement, or to a reconveyance. His only remedy was a reversal of the erroneous or unjust judgment, exonerating Cameron. As long as that judgment remains unreversed, it must, however, be deemed right and just.

The complaint is, that Cameron improperly avoided his note for the hundred dollars. This we are not allowed to presume; and there is no proof sustaining the allegation. But, were it admitted, that he ought to pay the hundred dollars, the concession would furnish no ground for a decree for a rescission of the contract of sale, or for a reconveyance, or for any other relief in equity. If Cameron is liable for more than he has paid, let that liability be enforced. If he is not so liable, it is because he has paid all that, by his contract, he ought to have paid.

The proper tribunal has decided, that he was not liable for more than he had paid, and the chancellor cannot revise that decision. That decision cannot be deemed a virtual rescission of the contract, or as furnishing, *per se*, any cause for a rescission.

Wherefore, the decree must be reversed, and the cause remanded, with instructions to dismiss the bill.

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MOTION.

**The Commonwealth vs. Welch.**

[Atto. Gen. Morehead for Plaintiff; Mr. Haggin for Defendant.]

FROM THE CIRCUIT COURT FOR SHELBY COUNTY.

The Chief Justice, not being present at the trial, took no part in the decision of this case.

October 27. Judge UNDERWOOD delivered the Opinion of the Court.

Prosecution, for keeping tavern without license.

THE attorney for Shelby county notified Welch, that a motion would be made, in the name of the commonwealth, against him, for the recovery of the fine imposed by the act of December 22nd, 1831, for keeping a tavern, without complying with its provisions.

Taverns where no liquors are retailed, and not in, nor within half a mile of, a town or city, may be kept without license. An act of '34 repealed all laws requiring such tavern keepers to obtain licenses.

The ninth section of the act to amend the laws concerning tavern keepers, approved February 24th, 1834, repeals all laws which require the keeper of a tavern, "not within any town or city, nor within one half mile thereof, and who shall not retail spirituous liquors, to obtain and pay for license."

By the facts agreed, it appears, that Welch did not retail spiritous liquors. He therefore, was not subject to pay a fine for keeping tavern without license, according to the provisions of the act of 1834, unless his tavern was within a town or city, or within a half mile thereof.

The Com'th, suing for a fine, for keeping a tavern (where no liquor is retailed) without a license, must shew that it was kept in a town or city, or within half a mile of one: she must make out the whole case by proof.

The facts agreed do not shew how far Welch's tavern was from the highest town or city, and hence he may, or may not, be subject to the fine imposed by the act of 1831. As it was the duty of the commonwealth to make out her case by proof, and to shew that Welch had violated the law, the burden of proof devolved on her, to give the distance of the tavern from the highest town. As she failed in this particular, the circuit court properly decided against her, unless the case should be disposed of under the act of 1831, without respect to the partial repeal effected by the act of 1834.

When a penal statute is repeal-

The motion was made in March, 1833; and if the circuit court had enforced the law as it then stood,

Welch being the keeper of a tavern, according to the case of *The Commonwealth vs. Shortridge*, 3 J. J. Marshall, 640, judgment would have been rendered against him for the fine. Can a subsequent repeal, or modification, of a penal statute exonerate offenders from the payment of fines incurred under the statute repealed or modified, when half the penalty is given to the person suing for it? Had the attorney in this case, such a vested right in the fine imposed by the act of 1831, as to place it beyond the control of the legislature, so that the act of 1834 cannot operate retrospectively?

That the legislature may, at any time, exonerate the citizen from the payment of a fine to the commonwealth, by repealing the statute under which it is imposed, where the rights of individuals are not prejudiced, cannot be doubted. The repeal of the penal statute would leave the judiciary without authority to render judgment. There must be law to sustain the judgment, at the time it is rendered. By repealing the statute which inflicts the penalty, the commonwealth virtually declares its will not to punish under that statute. The commonwealth, by her legislature, may define, and prescribe punishments for public wrongs. By repealing the statute which defines the offence and denounces the punishment, the prescribed rule is abrogated, and the citizen stands before the judicial tribunals as though no such rule had ever been made. At least, such is his attitude in reference to prosecutions against him by the commonwealth.

If, however, it be conceded, that individual rights vested by a statute cannot be effected by its subsequent repeal; still, in this case, the question is, whether the attorney who instituted the motion, has thereby acquired such an individual right, as places it beyond the power of the legislature. The act of 1831, makes it the official duty of the county attorneys to prosecute all persons violating the act, and gives "*half the amount recovered*," by way of compensation. The attorney incurs no risk; he is not made liable for costs; and there is no language vesting an interest before the *recovery* is actually had.—Until judgment rendered, we perceive no vested inter-

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*Welch.*

ed, or so modified as to exempt a class of cases from its operation, violations committed before, as well as those committed after, the repeal or modification, are exonerated—unless some private right will be divested by it.

Where a penal statute gives "the amount recovered," or part of it, to a prosecutor, his title to it depends upon the *recovery*; till which, he has no vested right that will prevent a repeal of the statute from discharging an offender.

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est in the attorney. Hence there is nothing which prevents the legislature from controlling the whole matter as it pleases; and which has been done, so far as to discharge all offenders against the act of 1831, whose taverns are not in a city or town, or within a half mile thereof, and who do not retail spirituous liquors. The act of 1834, therefore, has its appropriate effect.

Judgment affirmed.

DETINUE.

*Caldwell vs. Fenwick.*

[Mr. Cunningham for Plaintiff: Mr. Daviess for Defendant.]

FROM THE CIRCUIT COURT FOR MERCER COUNTY.

The Chief Justice was not present at the trial, and took no part in the decision.

October 27.

Judge NICHOLAS delivered the Opinion of the Court.

Detinue cannot be maintained where the thing sued for had ceased to exist when the suit was brought—as for a slave after his death: though it may be maintained where the defendant has parted with the possession of the chattel sued for, or where it was on being when the action was instituted, but perished afterwards.

FENWICK sued CALDWELL, in detinue, for two slaves—one of them, as proved on the trial of the general issue, being dead before the institution of the suit. The only question that need be noticed, is, whether the action could be maintained, for or on account of the slave that was dead.

It seems to us, that it cannot. The frame of the action and the principles of pleading forbid it. Detinue is a mode of action given for the recovery of a specific thing, and damages for its detention. Though judgment is, also, rendered, in favor of the plaintiff, for the alternate value, provided the thing cannot be had; yet the recovery of the thing itself is the main object and inducement to the allowance of the action. The thing sued for has to be so specially described in the writ, declaration, judgment and execution, that it may be distinguished from other things of the same species. The action is not adapted to the recovery alone of the value of a thing detained; nor can it be maintained therefor. The alternate judgment, for the value, is but a mere incident to the judgment for the thing; nor can

it be rightfully rendered, except where there is a judgment for the thing, from which it can result as an incident or consequence. It would seem, therefore, to be an indispensable requisite, that there should be a thing sued for. A demand for a dead slave does not fulfil this requirement. It is not a thing of estimation or value, such as the law requires to constitute the basis of an action.

Upon the principle of obviating inconvenience, the action is allowed where the defendant has parted with the possession, before suit brought. But where the thing is still in existence, it is a something to be sued for, and *per-possibility*, the defendant may obtain it, and surrender it in discharge of the judgment. Where the thing has been utterly destroyed before suit brought—where it no longer exists, the plaintiff's claim is reduced to a mere demand for reparation in damages, to be pursued by other and more appropriate remedies.

We have met with no authority in maintenance of the action. The case of *Carrel vs. Early*, 4 Bibb, 270, is not such an authority. It was determined there, that the death of a slave pending the action, would not defeat a recovery, and no doubt properly. For as the action was rightly instituted, the slave being alive, and a something to sue for in existence at the time of its inception, a subsequent casualty, not within the control of the plaintiff, should not have been allowed to defeat his suit. Besides, he could not have recovered the costs to which he was entitled, but by being allowed to progress to judgment. The language of the opinion, when taken, as it should be, in reference to the case before the court, imports nothing more, than that the death of the slave after suit brought, does not defeat the action. If it did import any thing more, it was so far extra-judicial.

As the court below allowed the plaintiff to recover for the slave that had died before the institution of the suit, the judgment must be reversed, with costs, and the cause remanded with instructions for a new trial, and further proceedings consistent herewith.

Fall Term  
1834.

Caldwell  
vs.  
Fenwick.

Fall Term  
1884.

TRESPASS &c

## Turner's Administrator vs. Booker.

[Mr. Crittenden for Plaintiff: Mr. Owsley and Mr. Monroe for Defendant.]

2d 334  
d117 222

FROM THE CIRCUIT COURT FOR SPENCER COUNTY.

The Chief Justice, not being present at the trial, took no part in the decision of this case.

October 27. Judge NICHOLAS delivered the Opinion of the Court.

Statement of the  
case.

THE defendant in error took judgment by default, against Turner, in an action of trespass for assault and battery; and upon the writ of enquiry, her damage was assessed to two thousand dollars, for which judgment was rendered in her favor. The next day, Turner, by his counsel, moved for a new trial, on the grounds set forth in the affidavit of an agent of Turner, and because the damages were excessive. The counsel for Mrs. Booker moved to have the motion continued till the next term, to afford an opportunity to take counter affidavits, and the counsel of Turner assenting, it was so continued. A few days thereafter, Turner died. At the next term of the court, his death was suggested, and the motion revived, by consent, in the name of his administrator, the plaintiff reserving to herself all right to insist that the motion had been abated by Turner's death, and that the administrator had no power to revive it, in the same manner she could have made such objection, if it had been attempted to be revived by *scire facias*. The court overruled the motion for a new trial, and the administrator prosecutes this writ of error.

Motions for new trials, in England, are made and decided, before judgment is entered. In this state, they are made at any time

Previous to any investigation of the grounds for a new trial, we are met with an objection on the part of the defendant in error, that, at common law, all modes of suit or action abated by the death of either party, and that they can only be revived, for or against the representatives of a decedent, by virtue of some express

statutory provision; and as there is none authorizing the revival of such a motion as this, it cannot be revived; the consequence being, that the judgment now stands freed and absolved from the motion, as though it had never been made. According to the course of practice in England, the motion for a new trial was always made before judgment, and the judgment never entered up till the motion was disposed of. A case like this could not, therefore, well have arisen in the English courts. But by a course of practice which has obtained in this country, and which has become too inveterate to be now called in question, the motion for a new trial is made at any time during the term, as well after as before judgment. Connected with this practice, has simultaneously grown up another, of treating the motion, when regularly continued over to another term, as a suspension of the judgment till the motion is disposed of, without any express order to that effect. It is by virtue of this supposed suspension alone, that the court retains its power of setting aside the judgment, for the purpose of a new trial at a subsequent term. A similar effect has always been given to petitions for rehearing in this court, of retaining the correction of a mandate of one term, within the power of the court at a subsequent term, without any express order of suspension. A judgment so suspended by motion in the circuit court, is not considered such final judgment, as to authorize the prosecution of a writ of error; neither can an execution be issued thereon. Of course, therefore, the judgment must be considered as virtually suspended, for every purpose, and the plaintiff can never be deemed at the end of his suit, and entitled to the fruition of his judgment, until that suspension is legally removed. Till then his suit may strictly be said to be still pending and undetermined.

The motion for a new trial is, therefore, a mere incident to his suit, of almost the identical same character it would have been if made before judgment, and can, with no plausibility, be put upon the basis of a separate

mover; its effects continue without any proceeding by his representative. *facias* to revive the judgment against his administrator, or by his consent, be disposed of.

Fall Term  
1834.

*Turner's adm*  
*vs.*  
*Booker.*

within the term  
—before or after judgment;—  
and have the effect of suspending the judgment until the motion is disposed of—in the same or at a future term. Petitions for re-hearings in the Court of Appeals, have the like effect.

A judgment suspended by a motion for a new trial, is not final: no writ of error lies, nor can execution issue, upon it.

A motion for a new trial is a mere incident to the suit: not a separate action, that abates by the death of the mover. Upon a *scire* the motion may

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Turner's adm  
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The death of a defendant, after judgment, and pending a motion for a new trial, does not abate the suit.

independent suit,—upon which the learned counsel endeavored to place it,—requiring the action of the representative of the mover, to obtain either its revivor, or the benefit of its suspending powers upon the judgment. If the administrator had not voluntarily appeared, and assented to the revivor, the plaintiff would have been bound to become the actor, and by *scire facias* against the administrator, put the case in an attitude to have the motion disposed of, and her judgment freed from its still controlling effect.

Having thus freed the case from this supposed difficulty, we are met by an objection on the other side, that such being the admitted effect of the motion, it must be by virtue of a sort of *nunc pro tunc* process, which will give it relation, and make it take effect, as though it had been actually made antecedent to the entering up of the judgment; the inevitable result of which would be, to abate the whole suit, inasmuch as the cause of action does not survive.

This assumption has no more of solid merit than the other. It is needless to unravel the argument by which it is attempted to be sustained, in order to expose its fallacy. The suspending effect given to the motion, made after judgment, is *sui generis*: it is based upon none of the analogies of the law, that we know of, and is the mere creature of an anomalous practice in this state, too old to be disturbed. Its effect reaches only so far as it has obtained allowance, *ex-necessitate*, in the furtherance of justice. We are not disposed to allow it to retroact, so as to produce injustice.

Where a verdict and judgment are rendered for excessive damages, or other good ground for a new trial exists, and the defendant dies, the new trial should be granted to his administrator, although the action is one that does not survive, and will

The damages, though heavy, yet, as the case stood upon the *ex parte* proof before the jury, were not so excessive as to authorize the interference of the court.

From the reasons stated in the bill of exception, for overruling the motion, as to the other ground relied on, it seems, the circuit court came to the determination it did, mainly because the result of granting a new trial, would be entirely to defeat the plaintiff's action. We cannot accord our assent to the sufficiency of this reason, though such were necessarily to be the result. If Turner, while living, was entitled to a new trial, that



right ought not to be impaired by his death. The plaintiff's judgment was valid, or not, according as he was, or was not, entitled to a new trial. If he had a right to be relieved from it, that right upon every principle, whether of law or justice, must survive to his administrator.

The grounds as made out in the affidavit of the agent of Turner, were, in substance, that Turner, who resided about twenty eight miles from the court house, was sick at home, and unable to attend court; that material witnesses had been subpoenaed, but did not attend; that the most material of them had apprized the agent, that he could not, and would not, attend on account of the indisposition of his wife; that he had been started off, by light, or a little after, of the day on which the trial took place, to procure a continuance for Turner, but did not arrive until about two hours after the cause was tried; that he started in time, and would have reached court before the cause was called, if his horse had not failed on the way, in consequence of the excessive heat of the weather.

The materiality of the absent witnesses was sufficiently made out by their affidavits used on the hearing of the motion, so that the right to a new trial rests upon the sufficiency of the diligence used by Turner. That he was really sick, and unable to attend court on the day the cause was tried, we cannot doubt; because from the testimony of the physician, introduced by the plaintiff, he ultimately died of the indisposition he then had. But the counter affidavits produced by the plaintiff leave as little room to doubt, that on the day previous, he was comparatively well; was drunk in Louisville, during most of the day, and did not return to his residence in the country, until after night: in fact that his sickness and death were the results of that "drunken spell." Had his excuse for his non attendance at court rested merely upon his sickness so produced, we would have little hesitation in disallowing it as unsatisfactory. But, as his agent was personally acquainted

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1884.

be destroyed entirely by granting the motion. But that may be prevented by terms—p. 335.  
Grounds for a new trial: held sufficient.

Sickness—the consequence of drunkenness, will not excuse want of due diligence, and entitle the party to a new trial.

Fall Term  
1834.

*Turner's adm  
vs.  
Booker.*

A new trial may be granted to a party who,—tho' he failed to use due diligence himself—did employ an agent to attend to the suit, who was competent, from his own personal knowledge, to show cause for a continuance, but was prevented from attending in time, by an accident which could not have been anticipated and guarded against.

New trials may be granted upon conditions which will prevent injustice; and where a defendant, in an action that does not survive, has died pending a motion for a new trial, the condition of granting it, should be, that the first judg't, should stand as a security for the last.

with the materiality of his witnesses, and was therefore as competent as himself, to make the necessary affidavit, in order to procure a continuance, we do not deem it indispensably necessary that Turner himself should have been personally present, for that purpose. Considering the distance, it would have been safer and more prudent for Turner to have started or sent to court the day before, and such, from the affidavits, probably would have been his course, had he not got drunk. But still the distance was not such as necessarily to have required it, in order to avoid the imputation of negligence. It might well have been accomplished without any very fast riding, before the probable call of the cause. The agent swears, that he could have accomplished it, and would have accomplished it, before the call of the cause, but for the unexpected failure of his horse. That is a species of casualty which the law does not require litigants to provide against, and their rights should not be forfeited by its occurrence. On the whole, we are inclined to think, that, under all the circumstances, he should not be deemed to have been culpably negligent, and consequently, that he was entitled to a new trial.

But, as the effect of setting aside the judgment and granting his administrator a new trial unqualifiedly, would be to take away the plaintiff's right of recovery entirely, we think the new trial should not be accorded, except upon terms such as would be fair and just between the parties. Applications for new trials are addressed to the equitable discretion of the court, and where the circumstances of the case require it, as this does, we do not doubt either the power or propriety of prescribing such terms, as will secure the plaintiff redress to the extent of such damages as a jury may think her entitled to, upon a full and fair hearing of her case.  
*1 Mar. 581, Litt. Select Cases, 20.*

The judgment, overruling the motion for a new trial, must therefore be reversed, with costs, and the cause remanded with instructions for leave for the administrator to plead, and a trial of the issue that may be formed, or for a new enquiry of damages; provided the administra-

tor will enter his assent of record, that the present judgment shall stand, as a security for whatever damages may be found for the plaintiff, and the costs of suit, subject to be credited by whatever, less than two thousand dollars, the jury may find for the plaintiff.

Fall Term.  
1884.

## Southard vs. Guthrie.

EJECTMENT.

[Mr. Crittenden for Appellant : Mr. Richardson for Appellee.]

FROM THE CIRCUIT COURT FOR JEFFERSON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court, in this case—in the decision of which Judge Nicholas took no part.

October 28.

SOUTHARD sued Guthrie, in ejectment, for a tract of land in Jefferson county, and, in deducing title from the commonwealth, read the record of a suit in chancery, instituted by Craven P. Luckett against John Peck, for foreclosing a mortgage, which had been given by Peck to Luckett, for the same tract of land and other estate ; a deed by a commissioner under that decree, to James W. Denny ; a judgment, and *feri facias* upon it, in favor of Southard against Denny, and a deed from the sheriff to Southard, of Denny's interest in the said tract of land, which had been sold by the sheriff in virtue of the said execution.

Statement of the case.

The circuit court instructed the jury, that the legal title to the land did not pass to Denny, in consequence of the decree and the conveyance under it by the commissioner, and that, consequently, the sheriff's deed did not convey the legal title to Southard ; and thereupon, verdict and judgment were, of course, rendered in bar of the action.

Instructions.

The only question now necessarily to be considered, is, whether the instruction given by the circuit judge, was right.

Question for decision.

Fall Term  
1884.

*Southard*  
vs.  
*Guthrie.*

Record of a  
chancery suit,  
and a sale under  
the decree, through  
which the plaintiff derives title.

Though, on this point, the record of the chancery suit presents rather an anomalous, and apparently incongruous, state of case, the legal import and effect of the facts which it exhibits, are, in our judgment, not difficult to comprehend.

Lucket's bill prayed that Peck's "*equity of redemption in the mortgage or trust property and estate in the deed mentioned, be forever barred and foreclosed—that the same be ordered to sale to satisfy, &c.*" Peck's answer consented to the decree as prayed for.

The decree directed that, unless by a given day, Peck should pay to Lucket seventeen thousand dollars, with legal interest from the tenth of March, 1818, till paid, his (Peck's) "*equity of redemption, of, in, and to the mortgaged premises in the bill and deed mentioned, be sold, or so much thereof as will be sufficient to pay the aforesaid demand, and costs of suit.*"

The commissioner, who had been appointed to sell under the decree, advertised that he would sell Peck's *equity of redemption*.

All the mortgaged estate sold for only about one thousand one hundred dollars, in notes of the Bank of the Commonwealth; and the tract of land now in controversy in this suit, containing about two hundred and forty acres, was sold for only sixty dollars.

The deed from the commissioner to Denny, only conveyed, *for Peck, and in his name, his right to the estate.*

Now, we are clearly of opinion, that, whatever the court, or the parties, may have intended, the decree cannot be understood as directing the sale of any thing more than Peck's equity of redemption in the property described in the mortgage and the bill. And, were it admitted to be proper, or allowable, to look out of the decree itself, for evidence of what the court intended, we are, also, clearly of opinion that the advertisement, the amount of the sale, and the commissioner's deed, all fortify the plain and inevitable literal construction of the decree: that is, that it directed the sale of Peck's equity of redemption only.

Against all these strong facts, Denny cannot be deemed to have acquired the legal title, or the mortgagee's

A decree, upon a bill for a foreclosure and sale, which orders, that, unless the defendant pay so much, by such a day, his "*equity of redemption in and to the mortgaged premises,*" shall be sold, authorizes the sale of *that equity only*:—not of the mortgagee's interest—especially where the advertisement and

interest, even were it admitted, that the court ought to have decreed the sale of the absolute and entire right to the mortgaged estate. But, the proceedings under the decree, indicate that the parties to it, the commissioner, and Denny himself, understood it according to its manifest literal import, and as this court feels bound to interpret it.

Wherefore, it is the opinion of this court, that Southard failed, on the trial, to shew that he had a legal title to the land, or any right to the possession thereof; and therefore, the judgment of the circuit court must be affirmed.

Fall Term  
1834.

deed, by the commissioner, are in conformity to the decree, and the sum produced by the sale, inconsiderable.—Such a deed does not pass the legal title to the estate.

## Shaw's Devisees *against* Shaw's Administrator. CHANCERY.

[Mr. Guthrie for Plaintiffs : Mr. Crittenden for Defendant.]

FROM THE CIRCUIT COURT FOR JEFFERSON COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

October 25.

SAMUEL E. SHAW died possessed of some real estate and personalty, to the amount of about four thousand dollars. By his will, he directed, that all the property he had received by his wife, should be restored to her, and that his executors should purchase for her a gig and harness of the value of three hundred and fifty dollars. After making some specific legacies, he devised the rest and residue of his estate, real and personal, to his brothers and sisters. What he had received by his wife, was a young slave and some personal effects to the amount of one hundred and fifty dollars. After his death, his widow, without making any renunciation of the provision made for her by the will, filed her bill against the executors and devisees, claiming an allotment of dower out of the real estate, and there being no child, one half of his personal estate, in addition to the bequest made her by the will.

Statement of the case.

Fall Term  
1834.

*Shaw's devisees*

vs.

*Shaw's adm'r*

Where there is a devise of *real estate* to a wife, without any declaration in the will, that it is to be in lieu of dower, she is not put to an election; but may take both devise and dower. But, as to the husband's personal estate—her right to distribution depending on his dying intestate—she cannot take under & against the will: she must make her election, within the time (12 months) allowed by law, and cannot come in for a distributable share, unless she renounces entirely the provision made for her by the will.

The circuit court decreed dower to her out of the real estate, and ordered the executors to distribute to her, one half of the personal estate, in addition to the donation made by the will. The widow having died, the devisees prosecute this writ of error against her administrator, to reverse the decree.

This proceeding in behalf of the widow, appears to have been instituted, and the decree rendered under a strange misconception of the character of a widow's right to a distributable share of her husband's estate, and under the supposition, that it stood upon the same footing with her claim to dower out of his real estate. Her claim to a half of the personal estate, was supposed to be analogous to that class of cases where the husband devises a part of his estate to his wife, but without any expressed intention that it shall go in lieu of dower, in which the courts have refused to put her to an election, to take, either her dower, or the devise. Her claim to dower is wholly independent of the fact whether the husband died intestate or not, and the law secures dower to her out of his real estate, though he may have devised the whole of it away. Her claim to any distributable share of his personal estate, is entirely dependent upon his dying intestate. It is in that event alone, that the statute of distributions gives it to her. So that when the husband devises away his whole personal estate, there can arise no question of intention upon the construction of the will, to ascertain whether he meant any provision made for her by the will, to be in lieu, or bar of her distributable share of his personal estate. She has no power, such as she has in regard to dower proper, to take both under the will and against it, so as to raise a question whether she shall be driven to her election. The only mode by which she can obtain any portion of the personal estate, where it has been devised away, is by renouncing absolutely all provision made by the will for her benefit, in the manner pointed out by the statute. Subject to this right of renunciation, the husband's power over his personal estate, to devise it, is plenary, and not at all shackled, as his real estate is, with her paramount right of dower.

In England, where the husband dies intestate as to a part of his personal estate, his widow is entitled to a distributable share of such part, unless it appears from the face of the will, that the provision made for her by it, was intended to be in lieu of all such claim. It is very questionable, however, whether the twenty fourth section of our statute concerning wills, has not cut off all such claim, unless she makes her renunciation. But that question does not properly arise in this case, as the whole estate is devised.

It was contended in argument, that the bequests to the wife, in this case, were so inadequate, that they could not be viewed in the nature of a provision for her. It would be difficult to maintain the argument, that a devise of five or six hundred dollars worth of property, was no provision for the wife, within the contemplation of the legislature; but, concede that it is not, what then? Would that dispense with the necessity of her making the required renunciation? We think not. The husband did not die intestate as to any part of his estate, and it is only in the event of his intestacy as to some part of his personal estate, that the law gives her any distributable share of it. Besides it was not alone for the purpose of divesting her of any interest she might have under the will, that the law required her renunciation; but for the sake of distributees and legatees, in order that there might be a speedy adjustment and distribution of a decedent's estate, she was required, within a reasonable time, to make manifest her determination not to abide by the will.

No aid can be derived to the complainant's case from the fact, that her bill was filed, before the twelve months allowed for making her renunciation had elapsed. It is sufficient to say, that this is not the mode of renunciation pointed out by the statute, and we have no power to adopt a substitute. But she does not, by her bill, manifest any intention to renounce, even in the event the court should think she would not otherwise be entitled to a share of the personalty; and the court could not undertake to elect for her, under a mere supposition as to what would be most for her advantage.

Fall Term  
1834.

In England, if the husband dies intestate as to a part only of his personalty, a share of that part goes to the widow; though she takes a devise also. *Query*—whether it can beso, under the statute of this state.

The inadequacy of a provision made for a widow, by the will of the husband, does not authorize a decree in her favor, for dower or distribution, unless she has duly renounced the provision made for her by the will.

The filing of a bill by a widow, for dower &c. is not equivalent to a renunciation of the provisions of the will; the renunciation must be made in the mode, and within the time, required by the statute.

Fall Term  
1884.

*Hickman*  
vs.  
*Littlepage.*

The decree, so far as it provides for the allotment of dower, to the complainant out of the real estate, and the payment of the devise made her by the will, must be affirmed; but so far as it directs a distribution to her, of a moiety of the personal estate not devised to her, it must be reversed, with costs, and the cause remanded, for a decree to be entered in bar of her claim therefor.

APPEAL  
FROM A J. P.

### Hickman vs. Littlepage.

[Mr. Draffin for Plaintiff: no appearance for the Defendant.]

FROM THE CIRCUIT COURT FOR ANDERSON COUNTY.

October 30.

Chief Justice ROBERTSON delivered the Opinion of the Court.

Attempt by one who had bet on an election, to recover back his money from the stake-holder.

LITTLEPAGE having, on an appeal from a judgment by a magistrate, obtained a verdict and judgment against Hickman, for twenty dollars, which he (Littlepage,) had bet on a congressional election, and deposited with Hickman as a stake holder,—this writ of error is prosecuted to reverse that judgment.

Money, or property, bet on any game or hazard, and so forfeited by the act of '99, can be recovered, only by a *qui tam* action.

The only objection to the judgment, is, that the suit was brought in the name of Littlepage alone, and for his own exclusive benefit.

The act of 1799, 1 *M. & B's. Dig.* 755, subjects to forfeiture—one half to the county, and the other half to any person suing for it—all money, or other property, which shall have been bet or staked on any game, or hazard, whatsoever; and no other than a *qui tam* action can be maintained under that statute, for any such money or property.

Money, or other thing, bet on an election, is forfeited, and may be recovered in the name of the commonwealth alone, or by a *qui tam* action. Act of 1828, §5.

The fifth section of an act of 1828, "more effectually to guard the right of suffrage, and for other purposes;" 1 *M. & B's. Dig.* 602, declares, in substance, that any money, or other thing, bet on the event of an election, shall be forfeited to the Commonwealth, and that a suit may be maintained therefor, either in the name of the



Commonwealth alone, or in that of any person who may choose to sue *qui tam*, for the joint benefit of himself and the Commonwealth.

Fall Term  
1834.

The third section of an act of 1833, "to amend the several acts against unlawful gaming," provides, "that if any person shall be stakeholder of money bet on any game, sport, or pastime, whatever, and be notified by the person making the stake or deposite, not to pay the same over, but to return it, it shall be the duty of the person so holding the stakes, to forthwith return them to the proper owners; and, on failing to do so, he, she or they, so failing, shall be liable to an action thereupon to the party aggrieved."

The stakeholder of money bet on any game, sport or pastime, is bound to restore it, upon notice; and on failure so to do, is liable to the action of the party aggrieved: Act of '33, §3.

And the twenty third section of the same act declares, that the "act shall be construed as an amendment to the several acts against unlawful gaming, and not as repealing any such act," except as to the time prescribed for bringing suit.

Act of 1833 declares that previous acts against gaming are not repealed by it.

In this case, Littlepage having deposited the twenty dollars with Hickman, and having afterwards demanded a restitution, the circuit judge instructed the jury that the suit could be maintained, as brought, in the name and for the sole benefit of the depositor.

Instructions.

Although all the statutes against gaming, should be taken in *pari materia*, and be made to harmonize with as full effect to each as possible, the more especially, as the act of 1833 expressly declares, that it was not the purpose of the legislature, in its enactment, to repeal any provision in any of the antecedent enactments, excepting only as to the limitation prescribed for bringing suit: nevertheless, if, in any other respect, the act of 1833 is, not merely cumulative, but clearly and necessarily inconsistent with any former act, it must, *ex necessitate legis*, be deemed, so far, an abrogation of such incongruous prior enactment; for example—if the third section of the act of 1833 should be so construed, as to give to the person depositing a bet with a stakeholder, the right to demand and receive, or sue for it, in his own name, such a right being altogether incompatible with the pre-existent necessity to sue *qui tam*, the third section

Though an act may declare, that it is not to repeal any pre-existing statute on the same subject: still, if any provision of a pre-existing statute is clearly in consistent with the new act, so far it must be repealed of necessity.

Fall Term  
1884.

Hickman  
vs.

Littlepage.

The clause of the act of '33, that requires the stake-holders of money bet on any game, sport or pastime, to return it to the betters, does not apply to bets made upon elections, and forfeited by the act of '28. Money bet on the event of an election, cannot be recovered from the stakeholder, by suit in the name, and for the sole use, of the party aggrieved. The mode of recovery, under the act of '28, is by action *qui tam*, or in the name of the commonwealth.

must, in that particular at least, necessarily have repealed so much of prior statutes as *required suits, in such cases, to be brought qui tam*, and did not allow the better to sue the stakeholder, in his own name.

We are disposed to think, that it would be very difficult to give any effectual interpretation to the third section of the act of 1833, without conceding to the depositor, in the class of cases for which it provides, the right to *restitution*, on demand, by suit or otherwise, in his own name, of his deposit. And we feel bound to give such a construction to that section as to allow that right.

Whether, nevertheless, the deposit, according to the principle and policy and provisions of the pre-existent statutes, for suppressing the demoralising and pernicious practice of unlawful betting, should be deemed to be still forfeited, and may be sued for whilst in possession of the stakeholder, or in that of the depositor after restitution; or whether, in that important particular also, all the former statutes should be held to have been constructively repealed, is a different question, and one which nothing in this case requires this court now to decide. Whenever that question shall come up for decision, the point to be considered will be, whether the legislature intended, by the enactment of the third section of the act of 1833, that the depositor should, *pro hac vice*, be entitled to be the stakeholder himself, subject to the contingency of being sued, *qui tam*, for the bet; or whether the object of the third section, was to give the stake absolutely to the depositor and exempt it from forfeiture.

But, though we should be inclined to concede to the person depositing a bet, the right to maintain a suit, in his own name, in the class of cases, designated in the third section of the act of 1833, we are, nevertheless, of the opinion, that bets on elections are not embraced by that section.

A bet on an election, cannot, with strict propriety of language, be denominated, "a bet on any *game, sport or pastime* whatever." And we are not inclined, in this respect at least, to give an enlarged or latitudinous import

to the words "*game, sport, or pastime,*" in the third section of the act of 1833: especially, as, by so doing, we should make it conflict with a radical provision of the act of 1828, against betting on elections, and which we do not believe that the legislature intended to abolish, or to clog.

As then, this suit must be brought according to the act of 1828, and as, according to that act, Littlepage could sue *qui tam* only, we are of the opinion, that his suit, as brought, in his own name and for his own benefit, cannot be maintained, and that consequently the instruction given by the circuit court to the jury was erroneous.

Wherefore the judgment must be reversed, and the cause remanded for a new trial.

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## McGowan vs. Hoy.

MOTION.

[Mr. Hanson and Mr. Haggin for the Appellant: no appearance for Hoy.]

FROM THE CIRCUIT COURT FOR LOGAN COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court in this case—in the decision of which Judge Underwood took no part.

October 30.

McGOWAN made a motion in the circuit court, to quash two executions for costs, which had been issued, in his favor, against Hoy, and also to quash certain endorsements thereon by the clerk, stating that, the executions had, at the instance of one Graves, who was a self-styled attorney in fact for McGowan, been issued for the benefit of the clerk, and of others who seemed to be his assignees.

An unauthorized endorsement on an execution, that it is for the benefit of a third party, is no reason for quashing it, especially after it has been collected. But the endorsement should be quashed, or annulled.

The court having overruled the motion, this error is brought to reverse the judgment.

It appeared, that the whole amount had been collected; and the bill of exceptions does not exhibit any evi-

This court will presume, there was proof enough to sustain the judgment of the court below, unless a bill of exceptions, showing a deficiency, states expressly, that it contains the whole.

ment of the court below, unless a bill of exceptions, showing a deficiency, states expressly, that it contains the whole.

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dence tending, in any degree, legitimately to prove, that, the clerk had any legal authority to endorse either execution for his own benefit.

The endorsements furnished no ground for quashing the executions, especially after each of them had become *functus*.

But, although McGowan may possibly not be prejudiced by the endorsements, in as much as they might afford no justification for paying the money to any other person than the plaintiff in the executions; nevertheless, they might subject him to peril, delay and costs; and therefore he would have had a right to an order setting them aside; and it would have been the duty of the court to sweep them out of the way—because, by making them, the process of the court was abused, and the creditor might thereby be prejudiced—had the record shewn, that there was no proof of authority to make the endorsements.

But the bill of exceptions does not state, that it contains all the evidence; nor can we make such an inference from what it does state.

Wherefore, on this ground alone, the judgment must be affirmed.

#### EJECTMENT.

### Harrison vs. McDaniel.

[Messrs. Morshead and Brown for Appellants: Mr. Crittenden for Appellees.]

FROM THE CIRCUIT COURT FOR CHRISTIAN COUNTY.

October 31. Chief Justice ROBERTSON delivered the following Opinion—Judge Nicholas concurring—Judge Underwood *dissenting*.

Case upon the act of 1809 for the speedy adjustment of land claims &c.—‘the 7 years law.’

THIS is an action of ejectment, in which the defendant succeeded, in consequence of an instruction given by the court to the jury, as to the construction and application of the statute of 1809, for the speedy adjust-

ment of land claims, and for the protection of actual settlers.

The plaintiff—claiming, under regular conveyances, an entire tract of land composed of parts of two contiguous grants, each older than that under which the defendant holds, and which covers some portion of the land included by each of the senior patents, within the boundary of plaintiff's deed—had actually settled within the bounds of his claim, but not within those of the junior patent, before the defendant, or any person under whom he held, had ever settled or entered on the land claimed by him; and afterwards, the defendant settled upon, and enclosed, more than seven years prior to the institution of this suit, a part of the land within the boundary common to the claim of each party.

Upon these facts, the circuit judge instructed the jury, that, though the defendant had enclosed only a part of the lap, and although a part of his enclosure had not been made seven years, still the statute of 1809 protected him, and barred the plaintiff's right of entry, to the whole extent of the interference between their claims.

The point presented by that instruction, is the only one we shall now consider.

The following doctrines are too firmly settled by authority, to be now questioned.

*First.* If a claimant enter upon his land, intending to take possession of the entire tract, no part of which is, at the time of his entry, actually possessed by any other claimant holding adversely to him, he is, by construction and intendment of law, in the actual possession of all the land included within the boundary of his claim.

*Second.* If the person making such first entry, hold under the inferior of two conflicting, adverse titles, and enter within the lap, he will not be disseized by a subsequent entry, by a person holding under the superior title, unless that entry be made within the bounds of the inferior claim; because an actual possession can only be divested by an actual adverse entry—and cannot be

and the owner of the *inferior* enters on, and takes possession of, the lap, a subsequent entry, under the better title, upon the interfering tract, but not the lap, will not oust him.

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Titles, claims, and settlements on the land, of the parties, respectively.

Instructions in the circuit ct., and question here.

Doctrines now settled, viz:

1. One who entered on land, intending to take possession of the entire tract, no part of which was then held adversely, is in possession to the extent of his claim—
2. An actual possession can be divested, but by an adverse actual entry—not by a constructive entry: hence, where there are conflicting claims,

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3. Where the holder of the superior title enters on the land, tho' not on the lap, his possession being, by construction, coextensive with his claim, a subsequent entry, under the inferior title, ousts him so far only, as he is encroached upon by actual enclosures. —And

disturbed by a merely constructive entry or possession. *Fox vs. Hinton*, 4 Bibb, 559.

*Third.* Although the prior entry or settlement, under the superior title, be not within the boundary of the inferior conflicting claim, nevertheless, a subsequent entry or settlement, under the inferior, and within the boundary of the superior claim, will not, beyond the actual close of the claimant under the inferior right, oust the pre-existent and continuing actual possession, under the superior title; because, except so far as there is an actual enclosure, the possession of the person subsequently entering, under the inferior claim, could only be constructive, and the prior constructive possession, under the better title, cannot be ousted or disturbed by a subsequent constructive possession, under the inferior claim: there cannot, in fact or in law, be any such *constructive* entry or possession under the junior grant, after the entry, and during the continuance, of the actual possession under the paramount title. *Millar vs. Humphreys*, 2 Mar. 446; *Moss et al. vs. Currie et al.* 1 Dana, 266; *Shrieve vs. Summers*, 1 Dana, 238.

The foregoing principles apply as well to actual settlers, claiming protection under the "seven years law"—act of 1809, as to those protected by the previous acts of limitation.

The actual settler is protected, by the act of 1809, in the title and possession of land of which he has had continued possession, according to the above established doctrines, for seven years: but the protection does not extend to land of which

We can perceive no sufficient reason why those fundamental doctrines of possession, established under the general statute of limitations which prescribes twenty years as the bar to an action of ejectment, should not be equally applicable under the statute of 1809—the chief object of which, was only to substitute seven for twenty years, in favor of actual settlers. The extent of the occupant's *actual possession* must be determined by the rules and tests just stated; and he cannot claim to be protected in the enjoyment of land, of which the law does not deem him to have ever been *possessed*. The act of 1809, properly understood, will, after an actual settlement for seven years, protect the settler against a suit for the possession or title of the land, of which he had been *possessed*, by actual settlement, for seven years; and not against a suit for the title or possession of land of which he had never been *so possessed*. Then, in a case on which there was no actual possession beyond the enclosure, the act of 1809 will not bar a suit

for the possession or title of land which had not been actually possessed or enclosed, for seven years immediately preceding the institution of the suit. Can the subsequent entry and settlement of a claimant, under a junior patent, be made, by construction, to evict the prior, actual possession of a claimant, also actually settled within the boundary of his elder patent, and before any settlement was made under the junior patent? Did the legislature, in enacting the statute of 1809, intend that the subsequent settler, under an inferior claim, should be preferred to a prior settler, under the superior title? If any settler should be deemed to be settled and possessed, to the extent of his claim, the first settler, under the best title, should surely be deemed to be settled and possessed to the whole extent of his claim; and, being the first settler and under the best title, he should not be postponed, by an anomalous and non-descript species of legal construction, to a subsequent settler under an inferior claim. We know of no principle, or analogy, or authority, for any such novel construction, or inconsistent application, or rather, as we think, perversion, of the act of 1809. It cannot be material, whether the claim be large, or small. A settler on a large tract, is as much, and as meritoriously, an actual settler to the extent of his whole title, as a settler on a tract ever so small, can be deemed to be on his entire claim. *In a contest between two actual settlers, which shall be preferred? The holder of the better right, surely.*

The actual possession of the elder patentee, first entering, or first settling, within the limits of his grant, wherever he may enter or settle, or however large may be his tract, is, under the act of 1809, precisely what it is under the general limitation law; and the actual possession of the subsequent settler, wherever he may settle, or however small may be his claim, is no more extensive under the operation of the one than the other statute; and nothing short of actual, adverse possession, for seven years, by a settler, any more than by any other claimant, will oust a previous actual possession by the adverse holder of a better title, or bar his right of

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he has never been so possessed.—His entry and settlement, under an inferior title, will not, beyond his actual enclosure, oust an adversary who had made a prior entry, and acquired a constructive possession, under a better title; nor will the act protect such subsequent settler's claim, against such better title, or bar the right of entry, or of action, under it, beyond his actual enclosure. [Judge Underwood is of a different opinion—See his Dissent, *post*.]

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entry, or of suit. Whenever the right of entry exists, the correlative right of suing must also exist. And we cannot admit that the elder patentee, who first obtained the actual possession of his entire tract, can be barred from entering on any part of it, by a subsequent settlement under a junior patent, except so far as the settler's enclosure shall have been continued for seven years. And, in this opinion, we are, as we believe, sustained, not only by the reason and analogies and objects of the law, but also by the authority of this court.

In *Miller vs. Humphreys*, 2 *Marshall*, 448, this court said:—"As the defendants had the elder title, and an entry on the land was made by their ancestor, prior to any entry having been made by the plaintiff, or any one under whom he claims, upon the tract covered by the interfering patent, it is evident, according to the repeated decisions of this court, that they must be held to be in the actual possession of the interference, except so far as they had been ousted by the plaintiff, or some one under whom he claims." "The plaintiff, indeed, may have acquired a title to the land enclosed by marks, fifteen years ago, under the act to compel the speedy adjustment of land titles, which forbids all remedy for the recovery of land after an adverse possession of seven years, under an interfering claim; but there is no pretence to say, that he could have gained a title to the additional part of the interference enclosed by himself, only about a year before the commencement of the action." Here, it is not only virtually decided, that an extension of an actual settler's fence over the line of interference, is an extension of his actual settlement, but it is clearly and expressly decided that, the elder patentee, having entered first, and thus having acquired the actual possession of his entire tract, a subsequent actual settlement by the junior patentee, within the lap, did not oust the prior possession, except so far as the settler's enclosure had been continued for seven years. And it is evident, that, in that case, this court treated the actual possession, the right of entry, and the right of action, as all depending on the same principles, under the statute of 1809, and under the general limitation law. It



is true, that the elder patentee had enclosed a small part of the lap; but that circumstance could have no effect on the general principle recognised and applied by the court, in that case; because the actual possession beyond the enclosure, was only constructive; and the court decided, that there was "*no prelence*" for saying that such a constructive possession had been *constructively* ousted, by the subsequent settlement, under the junior grant.

In *Hord vs. Bodley*, 5 *Litt. Rep.* 88, the same principle is even more explicitly and authoritatively established, and directly under the statute of 1809. In that case, it appearing, that Bodley, claiming under the junior patent, had actually settled within the lap, and that afterwards, Hord had also entered within the boundary common to his and Bodley's patents, this court said:—"To come within the operation of that act, (act of 1809,) it is not only necessary, that there should be an actual settlement upon the land, by Bodley, under an adverse title to that of Hord, but it is also essential, that there should be a continuation of the adverse "*possession* for the time prescribed in the act. But, if we are correct in supposing that, by his entry, Hord acquired the possession of all the land in contest, and that he has never since been ousted of that possession, it is impossible, that Bodley can have held such a continued adverse *possession*, as to bring his case within the operation of the act of 1809." Thus placing the extent of the settler's protection, under the act of 1809, on the question of actual *possession*, to be determined, as in all other cases, by the general rules which we have laid down. And, according to inevitable analogy, if those rules applied to that case, they must be applicable to this. For if, as decided, the actual possession, to the whole extent of his claim, acquired by Bodley's first entry and his settlement, was ousted by the inconsistent, *constructive* possession, acquired by Hord's subsequent entry, under the better title, on a small part of the land claimed by each of them, surely Harrison's prior actual possession of his whole tract, under his elder grant could not have been ousted by McDaniel's subsequent settlement, further

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than he had extended his actual enclosure ; for the rule of actual possession by construction, under the elder patent, must operate in the same way in each case : that is, the constructive possession of the elder patentee, cannot be ousted by the *constructive* possession of the junior patentee.

The act of 1809 could never have intended to bar a right of entry, or of action, against an actual settler, unless he had been, for seven years at least, after his first actual settlement, *actually possessed* of the land as to which the right of entry, or of action, is asserted. It clearly means, we think, that no action shall be maintained, against an actual settler, for land *of which* he had been, in consequence of his settlement, *actually possessed* for a period of seven years prior to the institution of the suit. And such was evidently the interpretation given to the statute by this court, in the cases from which the foregoing quotations have been made.

The extent of the settler's actual possession, like that of every other claimant, must be ascertained and determined by the general rules of law, when applied to the facts of each particular case.

As then, according to those rules, and the facts of this case, Harrison, and not McDaniel, was, and continued to be, in the actual possession of all the land embraced by his deed, excepting only so much as had been actually enclosed by McDaniel ; and as a portion of the enclosed land had not been enclosed as long as seven years before the commencement of this suit, he has, in the judgment of a majority of this court, a right to recover ; and McDaniel is protected, by the statute of 1809, only for so much of the land as he had enclosed as long as seven years prior to the institution of this suit.

Although Harrison's title was derived from two patents, we cannot doubt, that, as each of them is older than that under which McDaniel holds, and as Harrison entered on, and claimed to possess the entire tract included within the boundary described in his deed, his possession was undivided, and was coextensive with the limits of his claim, except so far as he had been actually disseized.

A party who has title, by a deed, to two adjoining tracts, granted by two separate patents, and makes an entry on the land, acquires a possession co-extensive with his title by the deed.

Wherefore, it is the opinion of a majority of the court, Judge Underwood dissenting, that the instruction given to the jury by the circuit judge, was erroneous; and therefore, the judgment must be reversed, and the cause remanded for a new trial.

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JUDGE UNDERWOOD, not concurring in the foregoing Opinion and Decision of the two members of the Court constituting the majority—presented his own views of the question, as follows:—

IN this case, the defendants have been actually settled upon the land in controversy, for seven years prior to the institution of the suit, claiming under the junior grant. The residence upon the land has been continued for seven years; for I cannot admit that the temporary absence of the family for a few months, to regain their health, is sufficient to break the continuity of residence. It cannot have that effect, any more than a visit to church or to a neighbor's house would. During the seven years continued residence of the defendants upon the land, the plaintiff Harrison has not had possession, by any actual enclosure or by settlement and residence within the lap, although he took actual possession, and had tenants living upon the land, embraced by his elder grants, on the outside of the junior patent, under which the defendants claim, before the defendants entered and settled within the interference, and has continued thus in possession ever since his first entry.

The question is—how far are the defendants protected by the act of 1809, to compel the speedy adjustment of land claims?

The circuit court was of opinion, and so instructed the jury, that the defendants were protected to the extent of the interference.

As Harrison claimed the land covered by two adjoining patents, issued in the name of B. A. Allen, under a deed to him, embracing both tracts, and as the junior patent, under which the defendants claim, interferes with the eastern tract of Allen, to the extent of seventy-three acres, and with the western, to the extent of forty-seven acres, and as the dwelling house and all the improvements of the defendants are situated upon the

DISSENT, by Judge Underwood: who is of opinion, that where two parties each claim a tract of land—the two tracts interfering with each other, and there has been no improvement made upon, no *pedis possessio* of, the lap, by the owner of the elder and better title; and the owner of the junior grant has settled on the lap, and retained an uninterrupted possession for seven years, his title is protected, by the act of 1809 (7 years law) not only as far as his enclosures extend, but to the whole interference.

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seventy three acres, I am of opinion that the statute of 1809 does not protect the defendants, or confer on them any right to hold the forty-seven acres. My reasons for this, are assigned at length, in the case of *Davis vs. Young*, [*Ante* 311.] But as to the seventy three acres, I think the defendants are protected by the statute, and hence I would affirm the judgment, leaving Harrison at liberty to enter upon, and take possession of the forty-seven acres, when he pleases.

If the present controversy ought to be decided upon those principles of construction in regard to possession, which have heretofore been recognised by this court, as growing out of the doctrines of the common law, I readily admit it can be shown, that the defendants have no actual possession of any land on the out side of their enclosures. If the statute requires a *pedis possessio* in fact, or by construction, of the entire interference, before a settler can bring himself under its protection, I admit that the principles of the cases cited in the opinion delivered, do show, beyond a doubt, that the defendants in this case have no possession, actual or constructive, on the out side of their enclosures. It would therefore follow, that protection here cannot go further than to secure the defendants, to the extent of the land actually enclosed, held and resided on, for more than seven years prior to the institution of the suit. For up to those actual enclosures, the principles of construction would put Harrison in the actual possession, and being so possessed, the limitation of seven years could not run against him. But I apprehend a decision of the controversy upon the foregoing grounds, without looking further, would be to stop short of that rule which the legislature intended to prescribe by the act of 1809.

The present differs from all the cases heretofore decided, in one important particular. The only *pedis possessio*, on any part of the interference, is held by those claiming under the junior patent. They have been actually settled, and residing on the land, for seven years before suit brought, and during this period, those claiming under the elder patent, have made no

improvements within the interference. In all the cases heretofore decided, both parties have had parts of the land common to their respective claims, in actual possession by enclosure. This being the case, the law, by construction, put the oldest patentee into possession in fact, up to the fences of his adversary, and of all his adversary's improvements likewise, according to the case of *Hord vs. Bodley*. The elder patentee being thus in possession, the limitation of seven years would not run against him. But when he has no such possession, I think the limitation, provided as a shield to the settler, may well bar any suit which he institutes.

The beneficent operation of the act of 1809, does not depend exclusively upon adjusting questions of possession. That act intended to connect the actual settler with his title, and to protect his title to the extent of the interference. With this view, the statute declares, "that no action at law, bill in equity, or other process, shall be commenced &c. whereby to recover the title or possession of such land &c." In this case, the defendants exhibited a title, deducible of record from the commonwealth, and proved such settlement and residence as is required, and yet by running off upon questions of possession, the defendants lose their title to all the land in contest, except so much as they have had enclosed for seven years. If the senior patentee had been possessed, by visible and tangible improvements within the lap, there would be strong reasons for applying the doctrines of possession founded on the common law rules, to this case. Such a possession on the part of the senior patentee, would operate as notice of his claim. It could not, thereafter, be regarded as of that dormant character, unknown to the neighborhood, which the legislature intended to bar. The preamble to the statute clearly proves, that the legislature intended to prohibit bringing such dormant claims forward, and asserting them by suit, to the disturbance of the actual settler. When the junior patentee is alone settled upon the lap, and no other has a visible possession in it, he may be entirely ignorant that there exists any interfering claim, I know of no principle upon which it can be presumed,

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that he is acquainted with the positions of the lines and corners of others. He may therefore settle, in good faith, upon the lap; and having done so, if he continues to reside and make his home upon it for seven years, the object of the statute was to protect his possession and title, forever thereafter, against all interfering claims. Such claims are to be considered dormant in respect to such actual settler, because not asserted within seven years after the settlement was made.

Suppose the elder patentee to be settled on a corner of his fifty thousand acres tract, and thereafter A, B and C should settle respectively on their one hundred acres tracts, under junior patents, which lie entirely within the bounds of the fifty thousand acres: why shall the senior patentee be permitted to recover all the land in these little tracts, except so much as the occupants have had under fence around their dwellings for seven years? Because, the majority of the court answer, the elder patentee was settled on his tract before the junior patentees entered and settled. Now, if the senior patentee had not settled at all upon his tract, and had not taken actual possession of it, by some visible improvement; or had done so after the junior patentees entered and settled; then the junior patentees would have been protected to the extent of their patents, beyond all doubt. Hence the success of the senior patentee, in the case supposed, depends entirely upon the fact that he happened to make the first settlement or enclosure upon his tract, although it may not be within five miles of the interfering claims. When the senior patentee commences his suits as plaintiff or complainant, he is to be favored because he settled on his tract, on the out side of the interference, before the defendants settled on their tracts. Where, I ask, is the foundation for such a preference to be found in the statute? It has no existence there. The legislature has recognised no difference between the plaintiff or complainant, asserting a paramount legal or equitable title, who lives on the claim set up by him, and a plaintiff or complainant who does not live on his claim. To make a difference is the work of legislation. But what policy could lead to such a dis-

inction and difference? The settler on the lap supposes, after seven years residence, that the benign policy of his country, has secured his land forever, against all claims which have been slumbering during that period. He is to be told, under the opinion delivered, "you are greatly mistaken, you are protected, to be sure, against non-residents and those who have no settlements or improvements on a tract, large or small, which covers your home; but if you have a neighbor settled upon a senior patent, which covers you, although he is settled on the outside of your lines, he may sue you and recover." There is less apology for the settler upon the senior patent, where he delays suing the occupant of the lap, than there is for a citizen of another state, who may not be possessed in fact of one foot of land in Kentucky. The non-resident may be ignorant of the settlement by the junior patentee upon the land; such ignorance cannot be imagined in the case of a neighbor. Hence there is no conceivable reason, which could have influenced the legislative mind, to make a distinction in favor of the neighbor, who lies by for seven years, merely because he had made the first settlement on his tract. but on the outside of the interference. And as no such distinction is expressed in the statute, but has its foundation, if indeed there be any for it, in a presumption, that the legislature did not intend to molest the common law rules relating to possession, I cannot see any reason for making it.

There is no ground on which to base a presumption, that the legislature intended to make an exception in favor of the elder patentee who may have settled first on the outside of the lap. His is truly a dormant claim, so far as it covers the interference, if it be not asserted within seven years,—during all which time, there has been a tenant on the land against whom the suit might have been brought. Having been negligent so long, the statute prohibits the institution of suit upon the senior patent, to "*recover the title &c.*" of the occupant; and if the suit is commenced, the statute gives a bar, to defeat the suit, and the *whole suit*, to the extent of the conflicting titles. The object of the statute was to prevent all

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litigation between the conflicting claims, after a lapse of seven years, during which the junior patentee was settled on the lap. The very title of the act, to wit, "to compel the speedy adjustment of land claims" shows that the legislature never intended that the senior patentee should delay as long as he pleased, and then litigate the titles by piecemeal, as the occupant from time to time extended his improvements. The legislature looked upon the land common to the interfering claims, as an entire thing, and when it was said in the act, that no suit shall be commenced" whereby to recover the title &c." it was as clearly manifested as language could express it, that the entire title to the whole land in contest was meant, and not a part of it. An action of ejectment, although denominated a possessory action, is nevertheless a suit to try the title. It is a fiction for that very purpose, and so used in this case. My idea is, that McDaniel defeats the whole suit, by showing his seven years continued residence upon the lap. The majority of the court allow the action to be defeated so far as it relates to the ground which McDaniel has had under fence, for seven years before suit brought, and allow a recovery as to the residue; thus splitting up the controversy—contrary to the case of *White vs. Bates*, 7 J. J. Marsh. 545.

In the case of *Davis vs. Young*, the majority of the court applied the statute in behalf of Davis, not because he resided on the land, but because he had extended his fences over the line, and enclosed part of the interference. And in that case, the main argument in support of the construction given to the statute, turns upon the supposed want of wisdom on the part of the legislature, in suffering the fields, orchards &c. to be recovered, when the dwelling house might thereby be rendered useless to its tenants. The court deemed it reasonable to give such an interpretation of the statute, as would vindicate the legislature from such folly. But in the present case, it seems that the dwelling house and cleared ground, which the defendants have possessed for seven years, are to be secured, and all else taken. Thus the tenants will be left without timber to make repairs, or



even fire wood to prepare food. It requires but little forecast to see, that the inevitable consequence of such an interpretation of the statute, in cases like this, will result in the dilapidation and abandonment of the improvements.

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The case of *Millar vs. Humphries*, 2 Marsh. 446, contains an expression, which is supposed to fortify the construction given to the statute in the case of *Davis vs. Young*, and also the opinion now delivered. The court in speaking of the facts in *Millar vs. Humphries*, and which shew that the junior patentee had extended his fences over the line, and enclosed a part of the interference, use the following language:—"The plaintiff, indeed, may have gained the title to the land enclosed, fifteen years ago, under the act to compel a speedy adjustment of land titles, which forbids all remedy for the recovery of land after an adverse possession of seven years, under an interfering claim &c." It is obvious, that the court overlooked the most important requirement of the statute, to wit. *actual settlement*. According to the language used, the bar provided by the statute attaches to an adverse possession of seven years, under an interfering claim, without regard to an actual settlement or residence. The court inadvertently followed the previous case of *Skyles' heirs vs. King's heirs*, 2 Marsh. 387, in which the distinction was not taken between an actual settlement or residence on the land, and a possession acquired and held by other means. In *Skyles' heirs vs. King's heirs*, the court say:—"If he (meaning a defendant) proves seven years possession, holding under his title, the statute shall aid him, although the plaintiff may be able to shew, by the production of his own title, or that of others, that the title did not, in law, or fact, pass to the defendant." I was concerned, as counsel, for *Skyles' heirs*, in the circuit court, and know that they did not reside on the land in contest; nor had it been held by their tenants, for seven years in succession, by actual residence, and cannot suppose that the original record on which this court decided, contains any statement in the exceptions, that such facts did

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exist ; I have not deemed it worth the trouble to examine the original record. The true construction of the act of 1809, which did not take effect until 1816, was never settled until the case of *Turner vs. Anderson*, 3 Marsh. 131, was decided. *Actual settlement* on the land was required in that case, which, by all subsequent adjudications, is construed to mean *residence* ; and in that case, for the first time, was the distinction taken between a possession by *actual settlement* or residence, and a possession by fields or enclosures.

Here McDaniel has proved every thing the law requires ; the lessor of the plaintiff has no *pedis possessio* within the lap ; and hence, I think, the statute protects him, to the extent of the seventy three acres, on which he is settled, and which is covered by the plaintiff's eastern patent. I think the other members of the court have erred in applying the doctrines of the common law, recognised by numerous decisions of this court, whereby the lessor is construed to be possessed in fact of the interference. I think the statute shews a legislative intent to change those doctrines in cases like this. If the lessor had proved a possession in fact of any part of the interference, independent of construction ; in other words, if he had shewn a possession by enclosures or improvements, he would then have brought himself within the rule recognised in the case of *Hord vs. Bodley*, and others similar. As he failed to do that, I think he has slept upon his right until he has lost it, to the whole interference.

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## Scroggin vs. Allan et. al.

EJECTMENT.

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24 316

[Mr. Haggin and Messrs. Sanders and Depew for Appellant: Mr. John Trimble for Appellee.]

FROM THE CIRCUIT COURT FOR HARRISON COUNTY.

Judge NICHOLAS delivered the Opinion of the Court—from which Judge Underwood dissented.

October 31<sup>st</sup>

JAMES T. EDGAR, the son of Henry Edgar, a bastard, having derived a tract of land by descent from his father, died, under the age of twenty one, without issue; and the land is now the subject of contest, between the mother of James T. Edgar, and a purchaser from the legitimate children of Henry Edgar's mother. It does not distinctly appear, which died first—James T. Edgar, or his paternal grandmother; but the inference is that she did.

The case turns upon the question, whether the children of Henry Edgar's mother, are his brothers and sisters, within the meaning of the fifth section of the statute of descents; which provides, that, where an infant shall die without issue, having title to real estate, derived by descent from the father, the mother of such infant shall not succeed thereto, if there be living any brother or sister of the father.

As by the rules of the common law, a bastard had no inheritable blood, and could neither receive from, nor transmit an inheritance to, his father, mother, brothers or sisters, it is very clear there can be no pretence for the claim here asserted in behalf of the children of Henry Edgar's mother, if those rules are still in force. For the act can only be presumed to speak in reference to such brothers and sisters, as would have inherited, provided the father of the infant had died intestate and childless. But, it is supposed, that the eighteenth sec-

Bastards have no inheritable blood, and cannot have either brothers or sisters, in legal contemplation; those of the same mother cannot derive estates of inheritance from, or through each other. The statute of descents (§18) enables them to take real estate by descent immediately from or through the mother, in the ascending line, & transmit it to their line as descendants, in like manner as if they were legitimate. But it gives them no capacity to take an inheritance from, or transmit one to, the collateral kindred.

Where an infant dies, without issue, having title to real estate derived by descent from the father, his

mother shall not succeed thereto, if there be living any brother or sister of such infant, or of his father, or descendant of either—*Statute of Descents, section 5.* But the statute intends *legitimate* brothers &c.; if there be none such, the mother succeeds to the estate.—[Judge Underwood thinks the bastard brothers and sisters may take the inheritance by force, of the statute.—*Dissent, post.*]

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tion of the statute of descents has changed the common law rules as to bastards, in this particular.

"In making title by descent, it shall be no bar to a demandant, that any ancestor, through whom he derives his descent from the intestate, is or hath been an alien. Bastards, also, shall be capable of inheriting, or transmitting inheritance, on the part of their mother, in like manner as if they had been lawfully begotten of such mother."

The same clause in the Virginia statute of descents, came under the consideration of the Supreme Court of the United States, in the case of *Stevenson's heirs vs. Sullivan*, 5 *Whea.* 207, in a case exactly like this; and it was construed by that court, not to transfer the estate of a legitimate child, to its bastard brothers and sisters by the mother's side. The true legal exposition of the words used, was held to be, that bastards shall have a capacity to take by descent, immediately from or through their mother, in the ascending line, and of transmitting the same to their line, as descendants, in like manner as if they were legitimate. The object of the legislature was deemed to have been, to remove the impediment to the transmission of inheritable blood from the bastard, in the descending line, so far as regards a maternal inheritance, and to give him a capacity to inherit, in the ascending line, from and through his mother. "But," says the court, "although her children are, in these respects, *quasi* legitimate, they are, nevertheless, in all others bastards, and as such, they have, and can have, neither father, brothers or sisters."

To permit bastard brothers and sisters to inherit from each other, in the manner and to the extent contended for, would require a paraphrase of the statute, something like this. "Bastards shall be capable of inheriting from their mother and her kindred, and she and her bastard children, and other kindred, shall be capable of inheriting from her bastard children, in the same manner as if the bastards had been lawfully begotten of such mother." The language used is so unlike this, and falls so far short of it, that it appears to us a vain effort to attempt to construe the two modes of expression, into

terms of equivalent import. But even though the language used could be so far strained, as to be made to come up to the supposed legislative intent, yet, as the construction of the Supreme Court gives legal effect to all the words used, and as there would be danger of exceeding the legislative intention by straining them beyond their fair or necessary legal import, we should still deem it safest, to adopt the restricted interpretation of that court.

The judgment must be affirmed, with costs—Judge Underwood dissenting.

JUDGE UNDERWOOD, not concurring with the other members of the Court, in the foregoing decision, delivered a separate Opinion and argument, as follows :—

I cannot agree to the interpretation now, for the first time, given by this court, to the eighteenth section of the act of December, 1796, directing the course of descents. In my opinion, the children of the same mother, who are bastards, may, under a correct exposition of that section, take and transmit estates to and from each other, by descent, in the same manner they might, and would do, were they the lawfully begotten children of the mother. If they were lawfully begotten of such mother, then they would be brothers and sisters, and as such, the fourth and fifth sections of the act would operate in their behalf. To my mind, the eighteenth section has so clear a meaning, growing out of the language used, that were it not for the case of *Stevenson's heirs vs. Sullivan*, I should think there could be no room for doubt.

The first clause of the section provides, that "in making title by descent it shall be no bar to a demandant, that any ancestor through whom he derives his descent from the intestate, is or hath been an alien." The rule here laid down was intended, no doubt, to operate in favor of legitimates. In virtue of it, brothers and sisters might inherit from a deceased, intestate brother or sister, notwithstanding the father or mother, by whom the relationship existed, was at the time,

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DISSENT, by Judge Underwood:— who holds, that the 18th section of the act of descents, of 1796, places bastards upon the same footing, in all respects, as it regards inheritance on the part of the mother, with those that are legitimate.

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or had been, an alien. The common law rule was "no one can inherit to another who derives his blood or relationship to the other through an alien." It was the object of the statute to annul this rule, and allow kindred to inherit one to another, notwithstanding the relationship was made out through or under an alien.

The second clause of the section provides:—"Bastards also, shall be capable of inheriting or transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother." What common law rules did this clause of the statute intend to repeal? I answer, *two*. First, that which declares that, "a bastard shall never take by descent;" and secondly, that which declares, that "a bastard can have no heir but the issue of his body." These were the common law disabilities. The legislature intended to remove them; but how far? Totally on the side of the mother, or *ex parte materna*; but to no extent on the part of the father. In nature, a bastard must have a father; in law, he has none. Coke says, a bastard is *nullius filius*. The statute intended to give him inheritable blood to some extent. What is the limit? "He shall be capable of inheriting, on the part of the mother, in like manner as if he had been lawfully begotten." What does this mean? It certainly intends to make him legitimate, to all intents and purposes, so far as it respects taking estates by descent, on the part of the mother. Blood is the principle of descent. Here the statute has given a new capacity to the bastard; it has infused into him inheritable blood, contrary to the common law maxim, that "a bastard shall never take by descent." But inheritable blood has not been given without qualification; it is confined to the part of the mother: for if it had not been so confined, the statute would likewise have repealed the maxim, that a bastard is *filius nullius*, and let him in to share inheritances on the part of the father. In thus giving inheritable blood on the part of the mother, the statute has made no distinction between lineal and collateral ancestors. The bastard may "make title by descent," through his mother, either from lineals, or collaterals, in the same manner as though

he were legitimate, contrary to the maxim, that "a bastard shall never take by descent."

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The statute not only intended to give the bastard inheritable blood, so that he might take estates by descent, through his mother, from her kindred, and from the mother herself, but it likewise intended, to confer a capacity to transmit inheritance, *ex parte materna*, in like manner as if he had been lawfully begotten. How transmit on the part of the mother? Surely it can mean nothing else, but to the kindred on the mother's side, in contradistinction to the kindred on the father's side; for it must be borne in mind, that the statute never intended to establish any relationship between the bastard and his father, or his father's kindred. But what is to be transmitted? An inheritance. And what is an inheritance? "An estate descending to the heir" (2 Com. 201,) by operation of law, on the death of the ancestor, is called an inheritance. If, then, a bastard has an estate which can descend, and he has an heir on whom the law can cast it, upon his death, then he has a capacity to transmit the inheritance. Now, at common law, although a bastard might die seized of an estate in its character descendible, yet, unless he had "issue of his body," there was no heir to whom the inheritance, or the estate, could be transmitted by descent, and it would escheat, *propter defectum sanguinis*. Here the statute steps forward, in such a case, and provides an heir in the kindred on the part of the mother. Such is the inevitable result of making the bastard capable of "transmitting inheritance on the part of the mother, in like manner as if he had been lawfully begotten." If the bastard had "issue of his body," the common law furnished an heir. If he had no issue, he would be indebted to the statute for an heir.

The construction put upon the statute by the Supreme Court, confines its operation to such real estate, so far as relates to the "transmitting of inheritances," as comes by descent, in virtue of the statute, to the bastard, immediately, or through his mother, in the ascending line. Thus real estate which the bastard acquires by purchase, is thrown without the operation of the statute, and is left to be escheated, unless the bastard shall have issue of his

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body begotten in lawful wedlock, who can inherit, according to the rules of the common law. Now, I can find no foundation for such a distinction in the statute. The statute intends to provide for two things, in favor of bastards: to wit, first, permitting them to take by descent from the mother, or her relations, as though they were legitimate, and secondly, transmitting to the mother and her relations, in like manner. For these purposes, new capacity was conferred; and the construction should be, just as it would be if there had been separate sentences—one relative to taking inheritance, the other as to transmitting it. Suppose then the statute had said nothing about “*inheriting*,” but had only declared that “bastards shall be capable of transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother.” I ask, if estates acquired by purchase would not have passed, under such a provision, from the bastard to the mother and her kindred? Such a provision, standing alone, would be a dead letter, unless it was made to operate upon estates acquired by purchase; for in the absence of the provision conferring the capacity to inherit, the bastard could never come to an estate as heir, and therefore, the provision in respect to transmitting inheritance, could operate on nothing unless it be estates acquired by purchase. Can the double capacity, of taking and transmitting, which has been conferred, so operate, when blended, as to exclude estates acquired by purchase, from passing under the statute, precisely as estates acquired by descent? Shall the estate which a bastard acquires by descent, through his mother, go back, in case of his death intestate, to her kindred, while the estate which he acquires by purchase escheats to the commonwealth? The statute points out no such difference. Its language is broad enough to give the estate, whether acquired by descent, or purchase, the same destination; and I think its policy requires a judicial interpretation which should put the inheritances to be transmitted, whether acquired the one way or the other, upon the same footing.



The Supreme Court, however, excludes estate acquired by purchase from the operation of the statute, because the expressions "on the part of the mother," as used in the statute, furnishes a sufficient foundation for doing so: Thus requiring, that the estate, to be transmitted in the descending line, shall be the same which was obtained by descent through the mother, in the ascending line. See 4 *Con. Rep.* 641. I find, on examination, that there is much said in the books, about transmitting an estate by descent to the heir "on the part of the mother," and "on the part of the father." The rule as laid down, in *Comyn's Digest*, is: "If a man has land as heir to his mother, and dies without alteration of his estate, the heir of the part of his mother shall always take." "But if a man takes by purchase, the heir of the part of his father shall inherit, and not the heir of the part of his mother." Now, I cannot see any thing in the meaning of the expressions "on the part of the mother, or father" as applied to the subject of descent, in the English law, which can sustain the construction of the statute now given. On the contrary, as I understand the use of those terms, they fortify the interpretation which I give.

We should remember, that the doctrine laid down in the English books, relates to legitimates, and not to bastards; and consequently, when they speak of the heir of the mother, or father, passing the estate to the heir "on the part of the mother, or father" it necessarily and exclusively relates to the identical estate which has been inherited, and which is to be transmitted by descent. But how does all this apply to bastards? They can take nothing by descent, unless aided by the statute, and therefore, it never could be said of them, that what they receive as heir of the mother, shall go to the heir "on the part of the mother." When the statute places them in a condition where such language can with propriety be applied to them, I admit, that it should have the same extent of meaning, and no more, which it had as applied to legitimates. What was the meaning of the expression, on the part of the mother, or father, applied

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to legitimates? Nothing more than to distinguish between the maternal and paternal lines, and thus to send the estate in the direction of the first purchaser, by excluding the paternal kindred where the estate came by the mother. It has the same meaning precisely, in the eighteenth section of the statute of descents, and intends, when applied to bastards, to designate the mother and her kindred, and to exclude all idea of the father, or his kindred, coming in for a share of the estate. But there is not the least intimation given, that the rule thus laid down, shall only operate upon the estate which descends upon the bastard. It certainly embraces estates which descend upon him, and those can only come through the mother, and hence must go as required, to the heir "on the part of the mother." The capacity to transmit inheritances, viz. estates "on the part of the mother" is conferred in terms broad enough to embrace lands purchased, as well as those acquired by descent, and I see no room to suppose that estates by purchase were not included because not expressly named.

Under my construction, I make the bastard children of the mother heirs to each other; and where any one of them dies intestate and childless, I think the statute transmits the estate of the deceased, whether it has been purchased or inherited, to the survivors. If this be not the case, then bastards do not stand as they would, "had they been lawfully begotten." The obvious meaning of the language, is, to confer on them all the capacities of legitimate children, as it relates to inheriting or transmitting inheritance on the part of the mother," that is, taking as heirs from the mother and her kindred, and transmitting estates to the mother and her kindred. The disjunctive *or* is placed in the statute between *inheriting* and *transmitting inheritance*, to shew that the legislature fully comprehended the difference between taking as an heir, and transmitting as an ancestor, and that it was intended to provide for both. If the copulative *and* had been used, it might have been contended with more propriety, that the legislature were legislating exclusively in reference to estates which might be

acquired by descent. It is supposed that it cannot be said with truth, that a bastard transmits an inheritance, unless he acquired the estate transmitted by descent. The fallacy of this idea will be manifest, if we will only reflect that a father transmits the estates which he acquires by purchase, to his legitimate children, under the laws regulating descents. With the strictest propriety, it may be said, in such a case, the father transmits an inheritance. The child inherits, the father transmits; the estate which passes, is called the inheritance. Bastards could purchase estates at common law, and could transmit such estates *as an inheritance* to their legitimate children. It seems to me, therefore, to be a very straitened and narrow construction, which requires that the phrase *transmitting inheritance on the part of the mother*, shall be applied to estates descended to the transmitting ancestor exclusively. The words "on the part of the mother" are not used to point out whence the inheritance came, but for the sole purpose of shewing where it shall go—no matter how the *propositus* came by it. Believing that the statute should have a liberal construction, I have thought proper to assign the reasons of my opinion.

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*Beckwith*  
vs.

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others.*

## Beckwith *against* Marryman and Others. CHANCERY.

[Mr. Crittenden for Appellant : Mr. Chapeze for Appellees.]

FROM THE CIRCUIT COURT FOR BULLITT COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court. November 1.

SARAH BECKWITH and William T. Yeatman, an infant, claiming title to a house and some ground in Shepherdsville, as purchasers under a decree for the sale of the estate of John Beckwith, deceased, rendered on the petition of persons claiming to be his heirs—she sold the

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house and ground to Caldwell, and covenanted that, on payment of the entire price, she and Yeatman would convey the legal title by a deed of general warranty.

Afterwards, the whole consideration having been coerced by suit, and Marryman, to whom the covenant for a title had been assigned, and who was in the possession of the property sold, having brought an action of covenant, for a failure to make a title—she filed a bill for enjoining his suit, and for compelling a specific execution.

During the pendency of that bill, to which William T. Yeatman was a party, the legislature passed an act authorizing the chancellor, on the assent of the infant and his father, and on payment to them of a moiety of the consideration, to decree a conveyance from the infant to Marryman, and declaring that the conveyance, when thus made, should pass all his right as effectually as if he had not been a minor.

The infant and his father assented to the conveyance, as just and beneficial, and a proper deed, with a covenant of general warranty, was executed by Sarah Beckwith and the infant Yeatman, which, after regular proof and acknowledgment in the proper office, was tendered to Marryman. But, on the final hearing, the bill was dismissed.

Two persons—one an infant, are joint claimants of a lot; the elder sells it, and covenants to deliver the deed of both, upon payment of the purchase money; the whole falls due, payment is enforced, and the deed made and tendered, according to the stipulation, before the infant attains to majority:—The vendee cannot object to the deed on account of the infancy of

Had no such statute, as that relied on in this case, ever been enacted, still, a conveyance by Sarah Beckwith and William T. Yeatman, with a covenant of general warranty, could not have been rightfully refused by Marryman, on the ground of Yeatman's infancy; because, as Sarah Beckwith only covenanted that *she and the infant* would make a deed of general warranty on *payment of the consideration, which was payable during William T. Yeatman's minority*, it is evident that the covenantee waived all objection to infancy, and agreed to rely on the warranty of Sarah Beckwith, and, with that security alone, to risk the avoidance of the infant's act. A deed, with warranty by Sarah Beckwith and William T. Yeatman, would, therefore, have complied fully with her covenant.

one of the grantors—for such a deed is all that the covenant calls for,

But there is a more formidable objection to a specific execution. It does not sufficiently appear, that Sarah Beckwith or William T. Yeatman has a complete legal title to all the property which she covenanted that they would convey. During the progress of this suit in the circuit court, they endeavored to perfect their title, and doubtless, they believed that they had, at the time of the hearing, an unquestionable title. Had they satisfactorily proved, that they had such a title, we should have been clearly of the opinion, that they would have been entitled to a decree, compelling Marryman to accept a conveyance; or had they, instead of going to trial when they did, asked for further time to perfect their title, or to prove that it was already unquestionable, and such indulgence had been refused, we should have been inclined to reverse the decree. But the decree must be tested by the proofs as they are now exhibited by the record; and, thus considering it, we are compelled to affirm it.

There is no proof, that those who were parties to the petition for selling John Beckwith's estate, were his heirs, and only heirs; nor that those against whom a decree was obtained, as Grayson's heirs, were his heirs, and only heirs; and, as Marryman was no party to either of those records, nothing which they contain can, as against him, be evidence. Moreover, the petition in the case of Beckwith's heirs, alleges that John W. Beckwith was one of the heirs, and he was not a party; nor is there any proof that he was ever divested of his right by descent. Wherefore, as there is no proof of a perfect title, without those two decrees, the chancellor could not *judicially* decide, that the title is such as Marryman should be compelled to accept. And therefore the decree must be affirmed.

Nothing contained in a record, is evidence against one who was no

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Parties in chancery, seeking a specific execution of their contracts to convey land, may be allowed time to perfect their titles, or to obtain evidence of their sufficiency.

Where a link in the chain of title to land, consists of a proceeding in chancery and order or decree for the sale of the land, as the estate of heirs—if the record contains no evidence that the parties whose estate was sold, were in fact the heirs, and only heirs, of him who died seized, it is insufficient, and the heirship must be proved by other evidence, party to it.

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CHANCERY.

## Williams against Rogers.

[Mr. Owsley for Plaintiff: Mr. Crittenden for Defendant.]

FROM THE CIRCUIT COURT FOR LAWRENCE COUNTY.

November 1. Chief Justice ROBERTSON delivered the Opinion of the Court.

Statement of the  
Case.

ROGERS sold to Williams a tract of land, delivered to him the possession, and covenanted to convey the legal title, for the consideration of two thousand dollars; of which, one thousand five hundred and fifty dollars were paid, and four hundred and fifty dollars assumed by a promissory note; upon which Shrieve, as assignee of Rogers, afterwards obtained a judgment against Williams.

Williams afterwards enjoined Shrieve's judgment, and prayed for ultimate relief, amounting, (as we understand his very vague and unskilful bill,) to a rescission of the contract, on the alleged ground, that Rogers had no title to the land, and was in doubtful circumstances.

In an amended bill, there was a prayer for a specific execution of the contract, for as much of the land as Rogers should be able to convey.

On the final hearing, the circuit court—being of the opinion that Rogers had not a sufficient title, nor any title whatever to the greater portion of the land—rescinded the contract, and decreed that he should refund to Williams nine hundred and thirty three dollars.

Williams complains: *first*, that the contract was rescinded; and, *second*, that the amount decreed to him, is not as much as he has an equitable right to demand.

A vendee of land, by bill in chancery, asks for a rescission of the contract, restoration of

As to the rescission of the contract, *Williams* has not in our opinion, any just cause for complaint; because, in his original bill, he seemed to desire a rescission, and the money he had paid, an injunction &c. upon the ground that his vendor had no title, and is insolvent; and afterwards, by amended bill, prays for a specific execution, as to so much as the vendor can show title to: it appearing, that the vendor had no title to part of the land, and not a clear one to any of it, the vendee cannot complain of a decree rescinding the contract entirely.

should be deemed to have sought such a decree; and because, he prayed, in his amended bill, for a conveyance of as much of the land only, as Rogers could shew an indisputable title to, and it does not appear, that Rogers exhibited satisfactory proof of a perfect title to any part of the land, or any colour of title to one moiety of it, which had descended to the heirs of a joint tenant, who had died in 1793, since the *jus accrescendi* was abolished, and whose interest had never been conveyed to Rogers.

But Williams may well complain of the decree for nine hundred and thirty three dollars. Where there has been no fraud, or manifest injustice, in the conduct of either party, and the one has enjoyed the use of the land, and the other has enjoyed the use of its accepted equivalent, the general rule, of equity, now recognised in this court, is, that, in decreeing a rescission for inability to convey the legal title, the land should be restored to the vendor, without any account for profits, and the price should be refunded to the vendee, without interest: whereby, according to their own estimate of equivalents—the one deeming the use of the price, to him, equal to that of the land, and the other deeming the use of the land, to him, equal to that of the price—they would be each, so far reinstated. But, if the vendee shall have made valuable and permanent improvements, or shall have committed waste, or otherwise *improperly* injured the land, there should be an account for waste, if any, and for improvements, if any. There are exceptions from this general rule; but nothing appears in this case, for bringing it within any exception; and the decree of the circuit court is a fitting illustration of the equity of the general rule itself; for, by charging Williams with rents, just as if he had been a lessee, intending to pay the estimated annual value of the use of the land, and not, as he was, the occupant of that which he deemed his own, the circuit court reduced the one thousand five hundred and fifty dollars, which he had paid, and the accruing interest thereon, to nine hundred and thirty three dollars; and would, by a similar process, not only have extinguished the whole amount paid for the land, and also about seven hundred dollars ex-

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*Williams*  
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When a contract for the sale of land, which the purchaser has paid for, and was put in possession of, is rescinded, for causes free of fraud, the use of the money, and the use of the land, are held to balance each other: the decree should, in general, restore the money to the purchaser without interest—the land to the vendor, without rents or profits. But—

If the purchaser has made valuable and lasting improvements on the land; or if it has suffered in his hands thro' neglect or mismanagement—these things are the subjects of valuation, account, and final settlement by the decree.

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pendent in making improvements, but have brought Williams in debt, had he occupied the land about nine years longer than he had done: that is, about eighteen years, instead of about nine years.

The circuit judge, therefore, erred in the basis of his decree.

The amount to be allowed for improvements, to one who has had the use of them for a time, is their value when he surrenders them, not their value at the time they were made.

He also erred, in the rule which he applied to the estimate of improvements and of waste. As Williams had the use of his improvements without charge, their real money value at the time of assessment, is the just measure of his equitable right to compensation for them; and he should not, therefore, be allowed, as by the decree of the circuit court, he was allowed, their value at the times when they were respectively made. Nor is he liable, as the circuit court seemed to think he was, for mere "*deterioration.*"

For common wear and tear, in the prudent, ordinary use of land, the occupant is not answerable. For waste and deterioration caused by gross neglect or mismanagement, he must account.

If a balance of purchase money remains unpaid when a contract for the sale of land of which the purchaser has had the use, is rescinded, the vendor is entitled to interest on it, in lieu of rent.

For the natural wear and <sup>tear</sup> ~~the~~, or such deterioration only as may have resulted from the prudent and ordinary use, he should not be required to account; but should be held responsible only for waste, or any damage which shall have been the consequence of his improvidence, culpable negligence, or wantonness; or from his having made an unusual, or unexpected, or extraordinary use of the land, or of any of its appurtenances.

But, as Rogers never had the use of four hundred and fifty dollars of the consideration, the annual legal interest on that sum should be deducted from the amount to which Williams would otherwise be entitled.

For the foregoing errors, without noticing others which may not occur again, the decree must be reversed, for such further proceedings and final decree as, according to the principles of this opinion, shall be found to be equitable.



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CASE.

2d 377  
94 430**Johnson vs. Castleman and Ormsby.**

[Mr. Guthrie for the Plaintiff: Mr. Benham for the Defendants.]

FROM THE CIRCUIT COURT FOR JEFFERSON COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

November 1.

THIS was an action on the case, brought by Johnson, against Castleman and Ormsby, in which he charges, that whilst his flat boat, laden with a cargo of flour, was floating down the Ohio river, a steam boat, owned by the defendants, and of which Castleman was the master, through the carelessness, negligence and bad guidance of said Castleman, struck his flat boat, with such force, that it was broke and sunk, and the cargo spoiled.

Declaration, in case, against the owners of a steamer, one of whom was master, for running down a flat boat

On the trial of the general issue, the plaintiff proved, that he was floating down the Ohio, at night, in his flat boat, laden with a cargo of flour, and was met by the steam boat of the defendants, ascending; that the steamer was first visible about two miles off; that there was a bright fire burning on the deck of the flat boat; that, shortly after the steam boat became visible, one of the hands on the flat boat lit a candle, placed it in a lantern, held it up, and so continued to hold it, until the boats came within thirty yards of each other; that, when the steam boat was within about a hundred feet, the plaintiff halloed to those on board the steam boat, not to run over him; no reply was made; the steam boat continued her course, across the river; when about opposite the bow of the flat, the steamer was straightened up stream, run across the bow of the flat, and immediately sunk her; that the flat was lost, and the cargo greatly damaged. The witness thought that if there was any one on the deck of the steamer, he must have been able to see the candle all the time it was held up. The night was clear and star light.

Facts proved upon the trial.

The circuit court thinking the action misconceived—that it should have been trespass, and not case, instructed the jury to find for the defendants.

Instructions—that the action was misconceived.

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*Johnson*

vs.

*Castleman &c.*

Deductions that may be made from the facts—from all which the jury might have determined, that the injury was the result of negligence, not of design; or the fault of the pilot, (who was not sued,) and not of the master.

We cannot say from the proof, that the steam boat was intentionally run against the flat. The light on the flat might, or might not, have been seen, according as there was, or was not, a vigilant look out from the steamer. Even if seen, still, the relative position and distance might have been miscalculated, until it was no longer practicable to correct the error committed in attempting to pass below her. The straightening of the steamer up stream, just before the boats came in contact, bears somewhat the appearance of wilful design; but, it is more than probable, from the proof, that that was done when the collision was no longer avoidable, either to ease the steamer in receiving the shock, or in the hope of avoiding the destruction of the flat. From the outcry made by the plaintiff, it is inferable, that if the straightening up stream, spoken of by the witness, had not taken place, that still the casualty would have occurred. That act alone, did not produce the striking and sinking of the boat; though it may have somewhat altered the point and mode of striking. The jury might well have inferred from the proof, that the destruction of the flat was the result of mere negligence, and not of wilfulness, or design.

Besides, as the duty of steering a steamer usually devolves on the pilot, and as there was nothing to shew, that the master was controlling the motions of the boat, at the time, the jury might well have inferred that what was done—whether the result of negligence, or design, was the fault of the pilot, and not that of the master; in which event, it would make no difference as to the form of the action, whether it were wilfully, or negligently, done. For where a servant, whilst in the actual employment of the master, commits a wilful trespass, without either the authority or implied assent of the master, the latter cannot be made liable in trespass, but only in case. We shall, therefore, treat the case as one in which the jury had a right to infer, that the destruction of the plaintiff's boat, was produced, either by the carelessness of the master, or the wilful misconduct of the pilot.

*Case*—not trespass, lies against a master, for the act of his servant, committed without the authority or assent of the master.

The general rule of discriminating between the actions of trespass and case, as laid down by Judge Blackstone, in *Scott vs. Shepherd*, 2 *Blk. Rep.* seems to have received general acquiescence and approval. That is, where the injury received from the act of the defendant, is *immediate and direct*, the action must be trespass; but where the injury is *mediate and consequential* merely, the action must be case. This rule, however clear and well defined it may appear to be, has, nevertheless, proved to be of very difficult application. It has produced as much apparent oscillation among the courts in England, as the application of any other rule of law whatever. Its application to a case like this, is treated by the judges and writers of that country, as of admitted difficulty. It would be unprofitable, at this day, to collate and compare all the cases on this subject. That work is already done, and ably done, by the text writers in most familiar use with the profession. A perfect reconciliation of all the cases, is perhaps impracticable. It may, however, be approximated, by constantly bearing in mind the distinction that exists, between the defendant himself doing the act complained of, and its being done by an agent, and that there are some acts, which authorize the bringing of either action.

The injury in this case may be said to have been *immediate*, because the act complained of, *itself*, not a mere consequence of that act, occasioned the injury. Trespass might, therefore, have been maintained against the master of the steamer, though the injury was unintentional, and the result of mere negligence. That the act complained of, need not have been wilfully done, in order to constitute a trespass, is illustrated by the familiar case, of a man turning suddenly, and unintentionally knocking another down; and by that of one man's wounding another, by accidentally firing off a gun.

But it is by no means a conclusive test, whether case will lie, to prove that trespass might have been main-

quential injury from the *same act*, either trespass or case may be maintained ~~for~~ as for a tortious taking of chattels, where the plaintiff may waive the trespass, and bring trover. And, in general, for any act of a defendant, which, though it was the direct and immediate cause of the injury, was done unintentionally, and through negligence on his part, *either action* may be maintained.

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It is a general rule—but one of difficult application—that where the act of the defendant is immediate and direct, the action must be trespass; and where it is mediate and consequential, the action must be case.

Where the *very act* of the def't, and not a consequence of that act, does the injury complained of—altho' it may have been *unintentional*, and the effect of mere negligence on the part of the def't, he is liable to the action of *trespass*, for the damages.

Where there has been an immediate, and also, a conse-

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tained. Either action, may sometimes be supported, where there has been an immediate, and also a consequential injury. It was said by Judge Blackstone, in *Scott vs. Shepherd*, that a person may bring trespass for the immediate injury, or case for the consequential damage, passing over the immediate injury. Upon this distinction it is, that trover, which is a mere species of the action of case, may be maintained, where the taking of the goods was tortious, amounting to a trespass—the bringing of trover, being, in the language of Lord Mansfield, 1 *Burr.* 31, a *waiver of the trespass*. Chitty lays it down, on the authority of adjudged cases in England, that where an injury arises from carelessness or unskilfulness in navigating ships, if the injury were merely attributable to negligence, or want of skill, and not to the *wilful* act of the defendant, the party injured has an election, either to treat the negligence or unskilfulness of the defendant, as the cause of action, and declare in case; or, to consider the act itself as the injury, and to declare in trespass. One of the cases cited by him, is that of *Ogle vs. Barnes and others*, 8 *T. R.* 187, very similar in its circumstances to the one before us. It was a motion in arrest of judgment, on the ground, that the action was misconceived, and that it should have been trespass, instead of case. The first count charged, that, through the negligence and unskilfulness of the defendants, their ship, with great force and violence, ran foul of, and damaged a ship of the plaintiffs. The second count only varied from the first, in stating that the defendant's ship was under the care and management of the defendant Barnes. The judges concurred, that the action was rightly brought, and one of them stated it to be like the case of *Morley vs. Gaisford*, 2 *H. Blackstone*, 442, where case was maintained for so negligently driving the defendant's cart, that it struck against the plaintiff's chaise. In the leading case of *Leame vs. Bray*, 3 *East*, 593, it was held, after much consideration, that, where the defendant, driving his carriage on the wrong side of the road, when it was dark, by accident drove against the plaintiff's curricule,

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trespass might be maintained; yet, in the subsequent case of *Rogers vs. Imbleton*, 2 Bos. & Pul. 117, a declaration in case was maintained against the defendant, for driving his cart against the plaintiff's horse—it being alleged to have been done through negligence, and the court said, it was not to be considered, that the case of *Leame vs. Bray* was thereby overturned. So also, in a still later case, cited in *Chitty*, 149, it was held that where the injury arose from the careless driving of one of the proprietors of a coach, case could be maintained against him and the other proprietors; and again in 11 Price's Rep. it was held, that case lies for an injury resulting from a carriage being driven against another, although the injury were committed with violence and the damage was immediate. In *Bliss vs. Campbell*, 14 John. 432, the defendant, being a trooper, had wounded the plaintiff, by negligently firing a pistol; and case being brought, the action was maintained—the court holding, that if the injury is attributable to negligence, though it were immediate, the party injured has his election, either to treat the negligence of the defendant as the cause of action, and declare in case, or the act itself as the injury, and declare in trespass. The same court, in the subsequent case of *Percival vs. Hickey*, 18 John. 256, maintained trespass, for the running down of one ship by another, at sea, though the result of carelessness; but, at the same time recognised the principle, that case also, could have been maintained.

In *Huggett vs. Montgomery*, 2 N. R. 446, the action was trespass, for running down a boat by a vessel of which the defendant was commander. After verdict for the plaintiff, the court set aside the verdict, on the ground that the action should have been case, and said it differed from the case of *Leame vs. Bray*, because the defendant, though on board the vessel, did not give the order which occasioned the accident, but the pilot did; whereas, in *Leame vs. Bray*, the defendant was himself driving the carriage.

From these authorities, we cannot doubt the present action would be maintained by the courts in England.

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It cannot reasonably be expected, that we should go farther, in preserving the distinction between the two actions, than they do; for they have a substantial reason for attending to it with strictness, that we have not: that is, in actions of trespass in England, if the plaintiff do not recover to the amount of forty shillings, he recovers no more costs than damages. It is so difficult, if not impracticable, for any but a person on board the vessel committing the injury, to know the particular circumstances, which should control the adoption of the one, or the other, form of action, that we think the rules for preserving the distinction between them, should not, in this class of cases, be carried any farther than they have already gone. This court will be inclined to relax, rather than aggravate, the rigidity of those rules. The two actions are so similar, both as to the form of declaring and pleading, and the mode of trial, and it is so difficult to discriminate the exact boundary line between them, even after the facts have been ascertained, that it would savour more of quaint fastidiousness, than sound policy, for the court to sacrifice, where it can be avoided, the substantial interests of litigants, for the sake of a comparatively unessential distinction.

Whether the act  
sued for, was  
the result of de-  
sign, or of neg-  
ligence, is to be  
decided by a ju-  
ry.

We think the court erred in its peremptory instruction to the jury, and that it should have been left to the jury to determine whether the defendant Castleman wilfully run his boat against the flat.

Judgment reversed, with costs, and cause remanded with instructions for a new trial.

Fall Term  
1834.**Burgen vs. Tribble and Wife.****TRESPASS.**

[Mr. Turner for Plaintiff: Mr. Caperton for Defendants.]

FROM THE CIRCUIT COURT FOR MADISON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court. *November 3.*

THE first question in this case is, whether, in an action of trespass for a tort alleged to have been committed by the wife alone, evidence that she acknowledged her guilt, is admissible?

In actions against husband and wife, the admissions of the wife are not evidence: they do not bind the husband.

In the second volume of Starkie on Evidence, p. 46, it is said that, "even in an action by husband and wife, in right of the wife as executrix, her declaration will not be evidence." "So an admission by the wife, of a trespass, cannot bind the husband." It would seem, from these doctrines, that, though the cause of action springs from the right or the act of the wife, her declaration or acknowledgment, even though it would be competent evidence against her alone, is not admissible against her husband, or in a suit in which he is a party, or in which his rights, personal or marital, may be affected. We are, therefore, of the opinion, that the circuit court decided correctly in refusing to admit, in this case, any declaration made by the wife, touching her agency in the alleged trespass by herself alone.

The next, and only remaining question is, whether the circuit court erred in directing a non suit. And, on this point, we are of the opinion, that there was not such a total destitution of facts, from which the jury might have inferred, that it was the wife who instigated the dogs to kill the plaintiff's mare, as to have justified the court in withholding from the jury, the right to decide for itself, upon the circumstances which were proved.

Wherefore, the judgment of the circuit court must be reversed, and the cause remanded for a new trial.

Fall Term  
1891.



CHANCERY.

*Young against Slaughter.*

[Mr. Samuel Daviess and Mr. Harlan for Plaintiff: Mr. Lindsey for Defendant.]

FROM THE CIRCUIT COURT FOR MERCER COUNTY.

November 3. Judge NICHOLAS delivered the Opinion of the Court.

**Facts of the case.** THE late Colonel Gabriel Slaughter, by his will, emancipated his slave John Young, and declared it to be his further will and desire, that his son John H. Slaughter should furnish John Young with food and raiment during life. He furthermore appointed John H. Slaughter his executor, and made him valuable devises, which have been accepted.

**Bill.** John Young filed his bill against John H. Slaughter, alleging that he had refused to furnish him with food and raiment, as directed by the will, praying that he might be compelled to do so, and for compensation for his failure therein theretofore.

**Answer.** Slaughter admits his refusal and failure, as charged, because Young is able-bodied, and competent, with proper industry, to feed and clothe himself, and insists that the testator did not intend Young should be furnished with food and raiment until he became too old or infirm to procure them by his own industry; and when that shall happen, professes his willingness to comply with the injunction of his father's will.

**Evidence.** The proof is, that Young, though old, is still able, by his labor, to clothe and feed himself; and that it would be worth fifty dollars a year to furnish him with food and raiment.

**Decision of the circuit court.** The circuit court dismissed the bill, because, "by a fair construction of the will, the defendant is not bound to support the complainant, so long as he is able to procure a reasonable subsistence by ordinary labor and industry."



We cannot concur in this construction. It looks to us more like amending the will, than construing it. The language is simply, that he shall be furnished with food and raiment during life. There is nothing in any part of the will, qualifying the import of this language. The bounty of the testator is not based upon any condition, nor is it to be postponed till the happening of any event whatever, such as the circuit court seems to aduce from it. The defendant insists, in his answer, "that his father could not have intended complainant should set down and do nothing, and be clothed and fed like a gentleman." We concur with the defendant, that the testator did not intend Young should be clothed and fed like a gentleman, and only like a negro; but we can find nothing in the testator's language, to warrant the idea that he was not to be clothed and fed at all, except in the event of his not being able to clothe and feed himself. Clothes and food are not all that would be required to support life comfortably as a freeman. Shelter would also be required; and the testator might well have intended so to provide for his old servant, as to require no farther exertion from him, than what would be necessary to hire a lodging. But it is a sheer gratuitous assumption, that the testator intended he should labor at all. The same feelings of bounty which prompted his emancipation, might well have suggested the fear, that, from indolence or dissipation, he would not provide himself with a comfortable support, in which event his emancipation might prove a curse, instead of the boon it was intended to be; and therefore, he determined to secure him a support in despite even of his own folly and vices. Freedom might, or might not, prove a blessing to Young, according as he should use, or abuse it. The testator intended, at all events, to afford him the chance of improving his condition by its enjoyment. We can understand not only the motive, but also duly appreciate those feelings of a kind master, which would prompt the endeavor to secure his slave against the effects of its abuse, by providing for him, in all events, the indispensable necessities of life.

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1834.

*Young*  
vs.

*Slaughter.*

A testator, by his will, emancipates a servant, and requires that his son, who is the principal devisee and executor, shall furnish him with food and raiment during life: by this will, properly construed, the emancipated servant is, under all circumstances, entitled to victuals and clothes suitable for one in his condition: not only when he is old and infirm, but while he is well able to support himself by his own industry.

Fall Term  
1884.

*Muldrov's ex-  
ecutors &c.*

vs.  
*Muldrov's  
heirs &c.*

The decree must be reversed, with costs, and the cause remanded, with instructions for a decree to be rendered in favor of the complainant, against the defendant, for a sum to be ascertained by computing at the rate of fifty dollars per annum, from October, 1830, till the time of rendering the decree.

CHANCERY.

### Muldrov's Executors &c. against Muldrov's Heirs &c.

[Mr. Crittenden for Appellants : Mr. Haggin for Appellees.]

FROM THE CIRCUIT COURT FOR WOODFORD COUNTY.

November 3.

Judge NICHOLAS delivered the Opinion of the Court.

If one sells land—the title to be made on payment of the purchase money, and dies, the right to the money passes to his personal representative; who may compel the heir to make the title, to enable him to recover it; and he is a necessary party to a bill for a specific execution, as the decree will require the money to be paid to him. The money, in his hands, is subject to the payment of debts and to distribution, like other personalty.

When the legal title to land,

ANDREW MULDROW, in his life time, sold a tract of land to Freeman, and gave his bond for a conveyance when all the purchase money should be paid. He received part of the purchase money himself; his executors received another portion since his death, and there still remains a part unpaid.

By a residuary clause in his will, he devised all his estate, real and personal, not specifically devised, to his son and only child, John A. Muldrov, who died after him, under full age, unmarried and childless.

The widow of Andrew, and mother of John A. Muldrov survived them both; but having since died, her executors and devisees brought their bill against the executors of Andrew, and the heirs of John A. Muldrov, and Freeman—claiming the balance of the money due from Freeman, and praying that the heirs may be compelled to convey the title to the land to Freeman. The heirs resist the claim to the money; deny that they are bound to convey, unless they are paid the full amount due at the death of John A. Muldrov, and pray a decree against the executors of Andrew, for what has been received since his death.

The circuit court dismissed the bill of complainants; and ordered the executors of Andrew Muldrow to pay the heirs of John, the amount received since the death of Andrew.

At the time of John A. Muldrow's death, he had united in him, the legal title to the land and the equitable right to the balance of the purchase money when paid. The legal right to demand and receive the purchase money was, and still is, in the executors of his father. To a bill by Freeman, against him, as devisee of the legal title, the executors would have been indispensable parties, and the purchase money would have been decreed to them. It would have become personal assets in their hands, for the payment of debts, though they would have been bound to account therefor, with him, as residuary legatee. At his death, the title devolved on his heirs; and his claim on the purchase money, through the executors of his father, devolved on his personal representatives. This shews conclusively, that his claim on the purchase money must, at his death, have constituted part of his personal estate, and was distributable according to the law governing the distribution of personalty. As his mother was his sole distributee, the ultimate right to the money must now rest with her executors, for the benefit of her residuary legatees. There can be no doubt that the executors of Andrew Muldrow could have compelled John A. Muldrow, in his life time, to convey the title to Freeman, so as to enable them to collect the balance of the purchase money, and his heirs can certainly stand in no better situation than he did.

Nothing can be better settled, than that after a contract for the sale of real estate, the vendor is to be deemed a trustee of the estate for the purchaser, and the vendee is a trustee of the purchase money for the vendor, and that the death of either, even before the time agreed on for the completion of the contract, does not alter his relative attitude; consequently, if the vendor die before payment of the purchase money, it will go to his executors, and form part of his personal assets. See authorities cited in *Sugden on Vendors*, 130.

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1834.

*Muldrow's ex-  
ecutors &c.*

vs.

*Muldrow's  
heirs &c.*

sold by executory contract, has descended to the vendor's heir, who, as such, is entitled to the purchase money, through the executor of his ancestor, & he (the heir,) dies, the legal title passes to his heir, and the right to the unpaid purchase money to his personal representative.

The vendor of land, is a trustee (pending the executory contract) of the legal title, for the vendee; who is, in turn, the trustee of the unpaid purchase money, for the vendor; and if they, or either of them, dies, even before the time for completing the contract, the heirs and personal representatives occupy the same attitude.

Fall Term  
1834.

*Barnes*

vs.

*The Com'th.*

No decree should be rendered, even in an *amicable suit*, unless all persons interested are parties. A want of indispensable parties appearing, in such case, this court directs a dismissal, unless they shall be made parties, in a reasonable time.

The view we have thus taken of the case, shews that the personal representatives of John A. Muldrow are indispensable parties, and the court would, therefore, have done right in dismissing the bill, provided it had been without prejudice.

Though the case has been prepared as an amicable suit, for the purpose of obtaining the opinion of the court upon the ultimate rights of the present litigants, we have not felt at liberty to overlook so radical a defect of parties.

The decree must be reversed, with costs, and cause remanded, with directions to dismiss the complainant's bill, without prejudice, unless the personal representative of John A. Muldrow shall, in reasonable time, be brought before the court, and for such further proceedings as may be consistent with this opinion.

# INDICTMENT.

## *Barnes vs. The Commonwealth.*

[Mr. Turner for Plaintiff: Atto. Gen. Morehead for the Commonwealth.]

FROM THE CIRCUIT COURT FOR MADISON COUNTY.

November 6. Chief Justice ROBERTSON delivered the Opinion of the Court.

Statement of the  
evidence.

ON the trial of an indictment against Barnes, for keeping a Tippling House in March, 1833—after the Commonwealth had proved that he had retailed spirituous liquors, in that month and year, in a house occupied by him, and kept as a tavern,—he proved that James C. Hendron had lived with him in the same house, during the year 1832; that they then did business there jointly, and were "*probably* jointly interested;" that Hendron had, in April, 1833, obtained a Licence for keeping a Tavern in the said house; that he, Hendron, about the commencement of the year, 1833, had removed to another house, which he afterwards kept as a tavern,

but that he still continued to visit "*the old stand*," in which Barnes remained, and that he occasionally superintended its business, and attended to its management. But the circuit court, being of opinion that the testimony adduced by Barnes, was immaterial, directed the jury to disregard the whole of it. And, thereupon, the jury found a verdict of guilty, and the court adjudged against Barnes a penalty of sixty dollars.

If the instruction by the court, and the verdict of the jury, can be maintained, the judgment should not be reversed for excessiveness in the penalty adjudged; because that penalty does not exceed the aggregate of those denounced by the act of 1793, and by the act of 1831, and, as the latter act imposes a fine of fifty dollars "*in addition*" to that imposed by the former act, we are not allowed to doubt that the legislative intention was, that the aggregate of both penalties should be adjudged against a convicted offender, for the keeping of a Tippling House, since the operation of the act of 1831.

Nor can we doubt that the evidence, *on which the jury decided*, was sufficient to authorize the deduction that Barnes had kept a Tippling House. The proof was that Barnes had sold by retail spirituous liquor, which had been drunk in his house, in which it was sold, in March, 1833. This would be sufficient under the act of 1793, according to any allowable interpretation of it; and the selling alone would be sufficient, under the act of 1831, because the act of 1820 defines a Tippling House to be a house in which spirituous liquors are sold by retail. But, in the opinion of this court, the circuit judge erred in instructing the jury to disregard the testimony given in behalf of Barnes.

The licence, which had been granted to Hendron, designated—as it should have done, especially since the act of 1831,—the house in which he was licenced to keep a tavern. That licence could not have been translated to any other house, by Hendron's removal, or by any other act of his. It did not, therefore, follow his removal, and attach itself to the house in which he resided in the year, 1833.

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*Barnes*  
vs.  
*The Com'th.*

For keeping a tippling house, the offender incurs a penalty of \$60—the aggregate of \$40 imposed by an act of 1793, & of \$20 imposed "in addition" by the act of 1831.

Evidence that a man sold liquor by retail, which was drunk in the house where it was bought, authorizes the inference that he kept a tippling house.

A tavern license should designate the house where the tavern is to be kept, and will not serve for any other house.

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1834.

Upon the trial of an indictment for keeping a tipping house at a certain time, proof of an offence committed at an aftertime, is inadmissible.

A license having been granted to one man, to keep tavern in a particular house, from which he afterwards removed — another being indicted for retailing spirituous liquors in that house, may show that he did it, as the agent, or partner, and under the cense of, him to whom it was granted; and may, on that ground, be acquitted by the jury.

The term, for which it had been, or must be presumed to have been, granted, (that is, one year) had not expired in March, 1833. As the indictment charged, that the offence had been committed in March, 1833, no subsequent offence was cognisable in this case; and therefore, the retailing proved to have been done in August, 1833, should not have been regarded by the jury.

When Hendron removed to another house, either his tavern licence had thereby become *functus officio*, or it applied to the tavern still continued in the house for which it had been granted. If the jury should have inferred from the facts proved by Barnes, that he continued to keep the tavern, after Hendron's removal, as it had been kept before, either for their joint benefit, or for that of Hendron alone, and under his superintendence and responsibility, and in virtue of his licence, it would have been their duty to have acquitted Barnes. These inferences *might* have been deduced from the rejected testimony; and consequently, the jury had a right to consider that testimony, and to decide on its effect.

Wherefore, the judgment must be reversed, and the cause remanded for a new trial.

MOTION.

Palmer vs. Palmer and others.

[Mr. B. S. Morris for Plaintiff: No appearance for Defendants.]

FROM THE BRACKEN COUNTY COURT.

November 6. Chief Justice ROBERTSON delivered the Opinion of the Court.

An estate in land does not pass by *nuncupative* will.

Upon an application to a co. court, for a partition of estate

ROBERT PALMER moved the county court of Bracken to appoint commissioners to make partition between the widow and heirs of his deceased father, of a tract of land, which, as the notice stated, they held as coparceners. The court dismissed the motion; and the fact, that the widow claimed the whole tract, under a *nuncu-*

*pative* will, is assigned by the county court, as the only reason for the dismission.

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1834.

The reason assigned, is altogether insufficient; because a *nuncupative* will cannot pass an estate in land.

But still we are of the opinion that it was right, on another and different ground, to dismiss the motion. There was no appearance by the co-heirs; nor was there any affidavit of any service of notice on them, or either of them; and in the case of *Newby and Wife vs. Perkins et al*, 1 Dana, 440, it was decided that, in such a case, an *affidavit* of service is indispensable. Nor does the notice, as written, state that the land, proposed to be divided, lies in Bracken county.

Wherefore, as it does not appear that the county court of Bracken had jurisdiction of the motion, when the judgment was rendered upon it, the dismission was proper.

Judgment therefore affirmed.

descended, among the heirs, it must be shewn, by *affidavit*, that such of them as do not appear, have been duly served with notice.

To authorize a proceeding in a county court, for the partition of estate descended among the heirs, it must appear, that the land, being within the county, is within the jurisdiction of the court.

## Boon vs. Nelson's Heirs.

DEBT.

[Messrs. Morehead and Brown for Plaintiff: Mr. Chinn for the Defendants.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court. November 6.

IN 1831, William Boon sued Nelson's heirs, on a bond for money, which had been given, in 1806, by the ancestor of the defendants, to the plaintiff, for property which the plaintiff, as executor of his deceased father, had sold, and the ancestor of the defendants had bought.

A distributee may divest himself of interest, and become a competent witness, by releasing the executor.

Suit by an executor; plea of

payment, and issue thereon: a distributee is a competent witness for the executor; for a judgment against him, upon that plea, would tend to show him accountable, not to exonerate him from liability to, the distributees; nor would it increase their liability to creditors of the decedent, as the distributees are only accountable for what they have received.

Fall Term  
1834.

*Boon*  
vs.

Nelson's heirs

The defendants pleaded payment, and, for proof, *re-*  
lied altogether on the presumption arising from the  
lapse of time.

To repel that presumption, by proving an acknowl-  
edgment within less than twenty years, and other facts,  
the plaintiff offered as a witness on the trial, his brother,  
who is one of the distributees of his deceased father's  
estate, and who had released all his interest therein to  
the plaintiff. But the circuit court, being of the opinion,  
that the witness was incompetent, would not permit him to  
testify; and thereupon verdict and judgment were rendered  
in favor of the defendants.

We cannot concur with the circuit court. The release  
divested the witness of all interest in the event of the  
suit.

But under the peculiar circumstances of this case, had  
there been no release, the ground of his supposed incompetency  
is not perceived. The bond is the individual property of  
the plaintiff; and, though the consideration came from the  
estate of his testator, a judgment on the issue, in bar of  
his action on the bond, would not exonerate him from  
liability to the distributees for the amount of it, but  
would rather fix that responsibility more certainly.

A judgment in this case, against the plaintiff, could  
not increase the liability of the witness to creditors of  
his father; because he would be liable only for what *he*  
had received. We are therefore of the opinion, that the  
witness is competent.

We are, also, of the opinion, that the circuit court  
did not err in setting aside a former verdict for the  
defendants, because the record furnishes no sufficient  
ground for complaining of that decision.

Wherefore, the judgment must be reversed, and the  
cause remanded for a new trial.



Fall Term  
1834.

**The Bank of the Commonwealth vs. Swindler *et al.*** PET. & SUB.

[Mr. Crittenden for the Bank : no appearance for Defendants.]

FROM THE CIRCUIT COURT FOR MERCER COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court. *November 6<sup>th</sup>*

UNLESS the charter of the Bank of the Commonwealth of Kentucky be unconstitutional, neither of the pleas, pleaded in this case, contains matter sufficient to sustain the judgment of the circuit court, in bar of the action.

Having hitherto decided, that the charter of the said Bank is legal and valid, and not being inclined to retract that decision, this court cannot sustain the judgment of the circuit court.

Wherefore, the judgment must be reversed, and the cause remanded, with instructions to sustain the demurrers to the pleas.

This case and about twenty others, from the same circuit, immediately following upon the docket, were actions brought by the Bank, upon notes discounted : to which the defendants pleaded in substance, that the act of Assembly establishing the Bank, was in violation of the constitution of the United States, and void, and the suit, therefore, being in the name of a corporation that had no legal existence, could not be maintained. The cases were all decided here, on the 6th of November. On the 17th, Mr. Haggin, as counsel for the defendants in some of the cases, moved to change the date of the judgments : in other words, to set aside the judgments which had been rendered on the 6th of November, and enter new ones, in lieu of them, under date of the 17th; stating, that his clients intended to prosecute writs of error to the Supreme Court of the United States, and desired to obtain the order of a Judge of that court, for a supersedeas in each case; which, under the act of Congress, could be awarded, but within ten days after the rendition of the final judgment of this court. The practice of the Federal tribunals, he observed, afforded numerous precedents of motions of this character and object, being allowed. But this court, upon consideration, overruled the motion; the Chief Justice remarking, that the court would not, in general, be inclined to encourage proceedings intended to supersede and revise its own judgments or decrees; and they saw nothing in these cases, to entitle them to any peculiar favor.

The charter of the Bank of the Com'th is not unconstitutional. *Lampton vs. Bank of the Com'th, 2 Litt. 301; Briscoe &c. vs. Same, 7 J. Mar. 349.*

This court will not, in general, change the date of a decision, or make any order, to aid a party in prosecuting a writ of error, in a case where the S. C. of the U. States has jurisdiction.

Fall Term  
1884.

PET. & SUM. **Wake et al. vs. The Bank of the Commonwealth.**

[Mr. Owsley for Plaintiffs: Mr. Crittenden for Defendants.]

FROM THE CIRCUIT COURT FOR JESSAMINE COUNTY.

**November 6.** Chief Justice ROBERTSON delivered the Opinion of the Court.

If a partial payment be made upon a note, which is afterwards paid in full, or merged in a renewal, without deduction of the partial payment, that may then be considered as so much money had and received by the payee, to the use of the party who paid it; and he may maintain *assumpsit* for it, or may plead it as a set-off, *pro tanto*, against the new note. It cannot be deemed a payment on the new note, not executed until after the money was paid.

To a petition and summons, brought by the Bank of the Commonwealth against Wake, as principal, and others as his sureties, on a note for six hundred and nineteen dollars, he pleaded that the note sued on was only a renewal of a former note, on which he had paid seventy five dollars, for which he never had received any credit; and which, therefore, he pleaded as a set off, *pro tanto*. The circuit court sustained a demurrer to the plea, and thereupon gave judgment for the whole amount of the note.

The only question now presented, is, whether the matter pleaded was pleadable as a set off: and it is the opinion of this court that it was.

If, instead of giving a new note, the obligors had paid off and taken in the old note, without being credited for the seventy five dollars which had, as averred, been paid, that sum might *then* have been deemed so much money received by the Bank to the use of the obligors, and for which an action of *indebitatus assumpsit*, might have been maintained. The new note having extinguished the old, the seventy five dollars could not have been pleaded as a payment on the new note. And consequently, if, as alleged in the plea, the seventy five dollars were inadvertently omitted in calculating the amount for which the new note should be given, the Bank should account for the sum so omitted; and it seems to us that *assumpsit* might be maintained for it, and, consequently, that it is a fit subject matter of a plea of set off.

Wherefore, the judgment must be reversed, and the cause remanded, with instructions to overrule the demurrer to the plea of set off.

Fall Term  
1834.**The Bank of the Commonwealth vs. Hopkins *et al.*** PET. & SUM.

[Mr. Crittenden for Plaintiff: Mr. Harlan for Defendants.]

FROM THE CIRCUIT COURT FOR MERCER COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court. *November 6.*

To a petition and summons, brought by "the President and Directors of the Bank of the Commonwealth of Kentucky" against James S. Hopkins and others, the defendants pleaded that, prior to the institution of that suit, the same plaintiffs having sued the same defendants, on the same note, and for the "same" cause of action, that suit was, by the judgment of the court, still remaining in full force and unreversed, "*dismissed agreed.*"

A judgment dismissing a suit "*agreed,*" is a bar to any other action for the same cause.— If the dismissal was ordered, without actual satisfaction, upon some new agreement, not complied with, an action upon the new agreement is the only remedy.

The circuit court having adjudged that defence good, and the plaintiffs having failed to reply to it, judgment was rendered in bar of this action.

The judgment of the circuit court was, in our opinion, right.

It has been frequently decided by this court, that the legal deduction from a judgment dismissing a suit "*agreed,*" is that the parties had, by their agreement, adjusted the subject matter of controversy in that suit; and the legal effect of such a judgment is, therefore, that it will operate as a bar to any other suit between the same parties, on the identical cause of action thus adjusted by the parties, and merged in the judgment thereon rendered, at their instance, and in consequence of their agreement.

If, in such a case, the original cause of action has not been actually extinguished by payment, or other actual satisfaction, but was only transformed, by the agreement of the parties, into a new cause of action, the rem-

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*Hodges*  
vs.  
*Holeman.*

edy must be on the latter, and cannot be maintained on the former and extinguished cause of action.

Wherefore, as the matter of defence has been aptly pleaded, the judgment of the circuit court must be affirmed.

# COVENANT.

## Hodges vs. Holeman.

[Mr. Dana and Mr. Owsley for Plaintiff: Mr. Crittenden and Messrs. Morehead and Brown for Defendant.]

FROM THE CIRCUIT COURT FOR FRANKLIN COUNTY.

November 6.

Chief Justice ROBERTSON delivered the Opinion of the Court.

Upon an obligation containing a stipulation, that the obligee shall do some act before he shall enforce payment, no suit can be maintained, until the act is done, and the obligee has given notice of the performance on his part, to the obligor;—which notice must be direct and authentic; information derived by the obligor, from one not authorized or requested by the obligee, to give it, is not a sufficient notice. Interest, in such a case, cannot be recovered for time anterior to the notice.

As, by the terms of the contract, the note, on which this suit is brought, was not to be payable until Holeman should remove all incumbrances on his share of the Commentator office, not only the removal of all such incumbrances, but notice, by *Holeman to Hodges*, of that fact was indispensable to the right to maintain a suit on the note.

A deed of trust to *Blanton and Major*, for the benefit of the Bank of Kentucky, does not appear to have been effectually released until the year 1831; and no sufficient notice to Hodges of any release has been proved. The only notice which was proved, was that given by Swigert, of a release by *the Bank*, in 1829. But, not only is that release insufficient, but Swigert being a stranger to the contract between these parties, and not appearing to have acted as Holeman's agent, or at his request, nothing which he said to Hodges, could be deemed such a notice as he had a right to require.

But nevertheless, judgment was rendered against Hodges, for the principal sum and the legal interest from the year 1829; which was, of course, erroneous.

Wherefore, the judgment must be reversed, and the cause remanded for a new trial.

Fall Term  
1884.Staton *et al.* vs. The Commonwealth, for  
Gill.

DEBT.

[Mr. Monroe for Appellants: Mr. Crittenden for Appellee.]

FROM THE CIRCUIT COURT FOR ADAIR COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

November 6.

GILL, as relator, instituted this action against Staton and his sureties in his official bond, as sheriff, alleging as a breach thereof, that the deputy of Staton had, contrary to law, levied a junior execution on property which should have been taken and sold under older executions, in which Gill was bound as surety, and which first came to the deputy's hands. In consequence of which, the elder executions were afterwards levied on the estate of Gill, and the debts made out of him.

Statement of the  
case.

We shall notice such questions only, as we deem necessary to a correct decision of the cause, upon its return to the circuit court; for a new trial, must be awarded.

One of the points litigated in the circuit court, relates to a tract of land on which Gill contends the deputy of Staton should have levied the executions in which he was bound. It seems, that the principal debtor had conveyed this land, by an absolute deed, to a man named Frazier. Staton and his sureties insisted, that they were not responsible for the failure of the deputy to levy the elder executions on this land, because the principal debtor had no title to it. The court, however, were of opinion, that the deputy acted illegally, if the money arising from the sale of the land was not applied to the payment of the elder executions first put into his hands; and instructed the jury to that effect. We are of opinion that the circuit court erred. If it be conceded, that the defendant in the executions, had no title to the land, then the relator cannot com-

The levy of a junior execution upon the property of a stranger, is no injury to the plaintiff, or to the surety of the defendant, in an elder execution, for which they can make the officer liable;—the parties to the elder, must show that the property sold was liable to it, to sustain an action against an officer for misapplying the proceeds.

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1834.

*Staton et al.*  
vs.

*The Com'th,*  
for Gill.

plain. It can be no injury to him, that the property of a stranger was not applied to the payment of a debt for which he was bound. He might gain an advantage if the money arising from the sale of a stranger's property, was applied so as to discharge him, but he has no right to claim that it shall be done. If the sheriff has levied on, and sold, a stranger's property in satisfaction of a junior execution subsequently coming to hand, the plaintiff in such junior execution may profit by the wrong done the stranger; but we know no principle which will allow the plaintiff in the elder execution first placed in the officer's hands, to say to him, "you have injured me, because you have committed a trespass on the property of a stranger, for the benefit of the younger execution plaintiff: you ought to have done it for my benefit." The sureties in the elder execution have no greater cause to complain, in such a case, than the plaintiff has.

If the land conveyed to Frazier was not subject to the elder executions, it was erroneous to allow the relator to recover any thing on that account. The plaintiff in the junior executions may indemnify the officer for levying and selling property not liable. The parties to the elder execution have no right to enquire how it was disposed of, until they have shown that it was liable to their execution.

Evidence to contradict or explain a deed—as, to show that, tho' absolute on its face, it was only intended as a mortgage, is not admissible, in a trial at law. That a deed was made for a *fraudulent* purpose—as to screen the land from creditors, may be shewn, by parol proof; and the fraud being established, a sale of the land under execution against the grantor, will pass the title.

If the deed to Frazier was executed in good faith, it seems to us that the land was not liable. The court permitted Frazier, who was introduced as a witness, to state that, although the deed was absolute on its face, yet it was intended by the parties to be a mortgage only. We are of opinion, that it was erroneous to let in such parol testimony, to contradict or explain the obvious import of the deed. Written instruments are valueless, if they can be thus modified by parol testimony. It might have been competent to impeach the validity of the deed to Frazier, upon the score of fraud, and to have shewn, by parol testimony, that it was a

were contrivance to screen the land from the claims of creditors. Nothing of the kind was attempted. Had it been successfully done, then it would have been made to appear that the land was subject to the prior executions.

If it shall appear, on another trial, that the land was subject to the senior executions, it will be a question of consequence, to settle the criterion of the damages, which the relator should recover. Upon this point, there is some difference of opinion among the members of the court. The Chief Justice and Judge Nicholas think, that where the sheriff satisfies the junior execution with the money arising from the sale of the principal's property, which was liable to the senior execution first put into the sheriff's hands; in consequence of which, the property of the surety is afterwards taken to satisfy the senior execution,—the sheriff is liable to the surety for the full value of his property so taken and sold to satisfy the senior execution, provided the money arising from the sale of the principal's property, and which was illegally applied in discharge or satisfaction of the junior execution, was sufficient to pay off the senior execution; but if not sufficient, then, as part of the surety's property could be rightfully sold to pay so much of the senior execution as would not have been paid by the sale of the principal's property, the surety is only entitled to recover the true value of so much of his property, as was sold to make the amount which the sheriff illegally applied in satisfaction of the junior execution.

Judge Underwood thinks that the criterion in such case, is this: whatever sum of money is made by the sale of the principal's property, and is illegally applied by the sheriff, in satisfaction of the junior execution, is the amount, with accruing interest, which the sheriff should pay to the surety. Judge Underwood thinks that the surety ought not to be allowed to go into the question of sacrificing his property under the hammer, any more than he could were he seeking redress against his principal for having paid the debt. The other Judges how-

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*The Com'th,*  
*for Gill.*

An officer who, with a senior and junior execution, in his hands, levies the latter first; in consequence of which, the former is satisfied by a sale of the property of a surety, is liable to the surety, for damages, to the full value of the surety's property sold: unless the defendant's effects were insufficient to satisfy the senior execution; then the officer is only liable for so much of the surety's property as sold for the sum the effects of the principal brought not for what was required to make up the deficiency — the loss, by sacrifice, if any, being thus cast upon the officer.

[Judge Underwood thinks the measure of damages against the officer, is the proceeds of as much of the surety's property as was wrongfully sold, without regard to actual value and sacrifice.]

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1834.

*Staton et al.*  
vs.  
*The Com'rs,*  
*for Gill.*

The fact that money had been made out of the defendant in an execution, after the sheriff had sold his property, and applied the proceeds to the satisfaction of a junior, when he ought to have applied them to the elder ex' on, does not affect the right of the surety in the senior execution, who consequently had the debt to pay—against the sheriff, for damages for his illegal proceeding; and evidence of that fact, on the trial of the action of the surety against the sheriff, is irrelevant.

ever, find sufficient reason in the illegal conduct of the sheriff, to justify a different rule.

Proof was offered conducing to shew that the relator's principal was not insolvent, and that money had been made out of him, after the sale of the property by the sheriff, and the illegal application of the proceeds to the discharge of the junior execution, and before the institution of this suit. This evidence was rejected by the court. This decision gives rise to another question of consequence, and upon which we are not unanimous. The Chief Justice and Judge Nicholas are of opinion, that the evidence was altogether irrelevant, and ought to have been excluded. They think that when a sheriff sells property, which he says he levied in virtue of a junior execution, which he advertised and sold in satisfaction of the junior execution, and for which he takes a sale bond payable to the junior execution plaintiff, having in his hands, at the time he was doing all this, a prior execution, which came to his hands first; that the amount made in virtue of the sale by the junior execution should be regarded in the same light as if it had been so much money actually paid by the defendants in discharge of the first execution; and therefore, the sheriff has no authority to levy the first execution thereafter upon the property of the surety; and if he does, he is answerable to the surety for the value of the property, without regard to the solvency or insolvency of the principal.

Judge Underwood (differing from the majority of the court) is of opinion that the sheriff is only liable to the surety, for so much as the latter had to pay, and could not recover of his principal; & consequently, that evidence to show the ability of the principal to pay something, is

Judge Underwood is of opinion, that the levy of a junior execution on the property of the principal debtor, at a time when the officer holds an elder execution which came to hand, before the junior execution did, selling the property thus levied, and taking a sale bond to the junior execution plaintiff, is not equivalent to the payment of the money upon the senior execution. He admits that if the senior execution was paid off, the sheriff would thereafter be a trespasser if he seized property under it, whether the property so seized belonged to principal or surety. But he denies that a misapplication of money or property, giving the execution which last came to hand, a preference over an elder execution



first in hand, is a payment of the first execution, or can with propriety be considered equivalent to it. Such misapplication would not furnish grounds for the principal or surety in the first execution to enjoin further proceedings upon it. Certainly, there would be no ground for injunction in behalf of the principal, nor is it perceived how the surety could suspend the plaintiff in the collection of his debt. Nor is it seen how such misapplication could deprive the sheriff of his justification, under the elder execution, were he sued as a trespasser, for a subsequent levy of it. Judge Underwood is therefore of opinion, that the sheriff is only bound to answer for the injury which the surety will sustain in consequence of the illegal act of the sheriff, in violating the rule prescribed by law; which injury is just the amount of loss thrown on him by his principal's insolvency. If the surety can obtain the sum he is compelled to pay, with interest, from his principal, he will be compensated. But so far as he cannot obtain indemnity from the principal, to that extent the sheriff ought to be answerable, and no further, except for nominal damages. Hence Judge Underwood thinks the testimony was improperly excluded.

It was erroneous to permit testimony to go to the jury, detailing what the deputy, Barton, said concerning the advice which he received from C. Tompkins.

It is believed, that the circuit court will be enabled, from the foregoing view, to see how far the multifarious instructions asked on both sides, and the various decisions given in the progress of the cause, comport with the opinion of this court; and hence it is not essential to consume time by a particular notice of each instruction and decision in the circuit court.

Judgment reversed, with costs, and cause remanded, for a new trial not inconsistent herewith.

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1834.

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vs.

*The Com'th,  
for Gibbs.*

admissible, to  
reduce the re-  
covery, *pro*  
*tanto*, and even  
to nominal da-  
mages.

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1884.

INDICTMENT.

## The Commonwealth vs. Moore.

[Atto. Gen. Morehead for Plaintiff: Mr. Chinn for Defendant.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

November 7. Judge UNDERWOOD delivered the Opinion of the Court.

A defendant indicted as a common gambler, is not entitled to a bill of particulars, or specification of acts intended to be proved against him.

It is a general rule that "where general character, or behavior is put in issue, evidence of particular facts may be admitted;—but not where it comes in collaterally."

Barratry is an exception to the general rule:—one indicted for that offence is entitled to a bill of particulars.

MOORE was indicted under the sixth section of the act of 1833, as a common gambler. Upon the calling of the cause, the attorney for the accused required a bill of particulars, containing a list of the several violations of the laws against gaining which the attorney for the Commonwealth intended to prove on the trial. The attorney for the Commonwealth refused to furnish such list. The court decided that the accused was entitled to a bill of particulars. The Commonwealth's attorney persisting in his refusal to furnish it, the court thereupon dismissed the prosecution. Whether the court erred in doing so, is the only question.

Were this case to turn on the rules applicable to barratry, the decision of the circuit court could not be shaken. All the authorities concur, that a barrator is entitled to a bill of particulars: "But," says *Lord Hardwicke*, in *Clarke vs Periam*, 2 *Atk.* 339, "that is a particular case, and differs from all others, for the drawing the line between pursuing him as a barrator, and following the course of his profession as an attorney, is a very difficult thing: because it is a crime of which an attorney for the most part, only can be guilty."

The same learned Judge takes the distinction between the case of a barrator, and the keeping a common bawdy house; in which last, although the indictment be general, without charging any particular facts, yet, at the trial, you may give in evidence particular facts and the particular time of doing them. "So where you charge that a man is addicted to drinking, and liable to be imposed upon, you are not confined, in general, to his be-

ing a drunkard, but particular instances are allowed to be given." 2 *Atk.* 339, *supra*.

In the case of *Janson vs. Stuart*, 1 *Durn. and East*, 754, *Justice Buller* remarks, after speaking of barratry and the keeping a common bawdy house: "So in the case of a common scold, it is not necessary to prove the particular expressions used; it is sufficient to prove generally that she is always scolding."

The opinions of the judges in the cases referred to, plainly indicate a well settled practice, to give in evidence particular facts, under general charges, whether they be found in indictments, or in the pleadings in civil suits. Thus it was ruled, in the case of *Clarke vs. Periam*, to be sufficient to put in issue a general charge of lewdness, and to give particular evidence under it. So in the case of *Gregory vs. Thomas*, decided by this court, 2 *Bibb*, 286, it was laid down as a general rule, "that in all cases where general character or behavior is put in issue, evidence of particular facts may be admitted, but not where it comes in collaterally." The reason assigned for the rule, is, that where general character is directly put in issue, it operates as notice, just as much so, as if the party were apprized of the particular facts by the declaration or plea. The case of barratry is made an exception, and a bill of particulars is required to constitute the notice. In all other cases the general charge is sufficient, where the matter embraced by it is directly put in issue.

Here the indictment puts in issue directly, upon a general charge, the behavior of the accused in relation to gaming. He is notified that the Commonwealth will, by proof, undertake to establish that he is a common gambler, and for that purpose, will go into his particular conduct in reference to the vice of gaming. Such is the effect of legal rules. He is bound to know them, and prepare for his trial accordingly.

We think the case before us, bears a stronger likeness to the case of common scolds, common bawdy houses, common gaming houses (also mentioned by

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*Fox.*

Lord Hardwicke in *Clarke vs. Periam*,) common drunkards, and common whores, or a general charge of lewdness, than it does to common barrators. The court erred in requiring a bill of particulars,

Judgment reversed, with costs, and cause remanded for a new trial.

TRESPASS,

## Walker and Tudor vs. Fox.

[Mr. Turner for Plaintiffs: Mr. Caperton for Defendant.]

FROM THE CIRCUIT COURT FOR MADISON COUNTY.

November 7, Judge NICHOLAS delivered the Opinion of the Court.

The pleadings

ISHAM R. FOX sued Walker and Tudor, in trespass, for breaking his close, and entering his dwelling, breaking open his outer door &c.

They justified, under a *fi. fa.* in favor of Walker, against Talton Fox, in Tudor's hands as constable, that the slaves, goods and chattels of Talton Fox were on the premises of plaintiff, and there fraudulently withheld and concealed by him; that they entered finding the outer door open, to serve the execution &c.

Plaintiff replied, that the property of Talton Fox was not fraudulently held and concealed by him, on his premises, and that his outer door was not open at the time of the trespass.

Verdict and judgment were rendered in favor of Fox; to reverse which, Walker and Tudor prosecute this writ of error.

The evidence.

The proof was, that the defendants went upon the plantation of the plaintiff, to levy Walker's execution upon a negro boy of Talton Fox's—the boy then being on the plantation; that, in the absence of plaintiff, Tudor, by the direction of Walker, lifted the latch of the outer door of plaintiff's dwelling, entered and search-

ed his chambers, and not finding the boy there, Walker broke the locks, and opened the doors of two adjacent out-buildings, but without finding the boy. The plaintiff held the boy under a mortgage from Talton Fox, duly recorded.

The court instructed the jury, that the defendants had a right to go on plaintiff's premises, in search of Talton Fox's property, if he had any there at the time; but that defendants had no right to open the outer door of plaintiff's dwelling and enter, whether Talton Fox's property was in there or no; nor had defendants a right to break open the door of any out house on plaintiff's land, unless the jury should find, that, at the time of breaking open such out house, Talton Fox's property was in the same. And if the jury should find the defendants entered the plaintiff's dwelling house, not finding the outer door open, or broke open the out-houses of plaintiff, in which none of Talton Fox's property was, at the time, the defendants were, by so doing, trespassers by relation, from their original entry on plaintiff's land.

This instruction contains a correct exposition of the law of the case. A sheriff cannot lawfully enter the dwelling of a defendant, whilst the outer door remains closed, to do execution under a *fi. fa.* or generally to execute civil process in personal actions. The lifting the latch of the outer door to open it, is equivalent to breaking a lock.

It is true this principle of exemption is confined to the goods of the owner of the house, or such goods of others as are brought there without fraud or covin, and does not protect the goods of others brought there to prevent execution.

It is also true, that in the latter case, after demand or request to have the goods so fraudulently held delivered up, and refusal, the sheriff may break open the outer door, to do execution. But in this case, there was no proof conducing to shew, that any property of Talton

house. But the occupant of a house cannot use it, to protect the goods of others from execution, or to screen strangers from the service of process; and where goods have been deposited, or strangers have taken shelter, in the house, for such purposes, and are not surrendered upon the requisition of the officer, he may break open the house, and go in, to serve his process.

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An officer, having an execution against a debt whose property is upon the possession of a stranger, may enter upon the stranger's land, and go into his buildings—breaking open out-houses, and entering into the dwelling house when it is found open, to levy on the defendant's goods. But these things the officer does at his peril: if the debt has nothing upon the premises subject to the levy, the officer, the plaintiff directing him, and those assisting, will be deemed trespassers *ab initio*.

An officer cannot lawfully enter by force, into a dwelling house, (to lift the latch and enter, is to enter by force) to levy an execution on the goods of the owner, or any other goods deposited there, without fraud or covin; nor to serve civil process upon any of those who dwell in the

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vs.  
*Wilson.*

Fox was so fraudulently held by the plaintiff, for the purpose of preventing execution. So that the defendants would not have been justified in opening the outer door of the dwelling, even though the slave had been there at the time. So also, though the officer might have been justified in breaking the doors of the out houses, provided Talton Fox's property had been found there, yet he broke them at his peril, and no such property being found, he committed a trespass in so doing. In general an entry into the close of one, to seize the person or property of another, will not be justifiable, unless it turns out that they were there at the time.

Judgment affirmed, with costs.

**EJECTMENT.**

**Watson vs. Wilson.**

[Messrs. Morehead and Brown for Plaintiff: Mr. Crittenden for Defendant.]

FROM THE CIRCUIT COURT FOR SIMPSON COUNTY.

November 7. Judge NICHOLAS delivered the Opinion of the Court.

An agreed case—showing the manner in which the parties respectively make title to the land in controversy.

WILSON, as a judgment creditor of John Benbrook, filed his bill, in 1824, against him and Ezekiel Benbrook, to set aside a deed from John to Ezekiel, as fraudulent against creditors, and to subject the land conveyed to the satisfaction of his judgment. The relief sought was ultimately obtained; the land sold under a decree of the court, Wilson became the purchaser, and it was conveyed to him, by a commissioner, under the decree.

Subsequent to the service of subpoena on John and Ezekiel Benbrook, a *feri facias*, which issued on a judgment against Ezekiel, was levied upon the land, and the same sold to one Coffey, who conveyed it, in trust, to secure debts. The land was afterwards, by decree of

court, sold under this trust; Watson became the purchaser, and the right of Coffey and the trustees was conveyed to him, by a commissioner, under that decree.

Pending Wilson's suit against the Benbrooks, Ezekiel died. His death was suggested on the record, in July, 1826; but the suit was not revived against his heirs, till October, 1828.

In January, 1828, Watson made his purchase, under the decree in the other suit; and in April, 1828, the commissioner's deed to him, was approved, and ordered to record.

Watson having got into possession, Wilson brought an ejectment against him, and the foregoing facts having been presented by an agreed case, the circuit court rendered judgment in favor of Wilson—treating the conveyance to Watson, and that to Coffey, under whom he claimed, as absolutely void, because made pending Wilson's suit against the Benbrooks, in which he ultimately obtained a decree.

It is now contended, in behalf of Wilson, that the judgment of the circuit court is fully sustained, and the whole case concluded, by *Scott vs. McMillan*, 1 Litt. 307, and *Scott vs. Coleman*, 5 Mon. 73.

On the other hand, it is contended, in behalf of Watson: *first*, that the conveyances to Coffey and Watson, were not overreached and rendered absolutely void, by that to Wilson; but, that they passed the title, and are only voidable by a suit for that purpose; because the effect of the *lis pendens* was merely to give constructive notice, and actual notice of an equity having only the effect of enabling the holder to get, by suit, the title from a purchaser, with such notice: *second*, that Wilson's suit having been instituted in 1824, and no decree obtained till 1829, the delay being unexplained, he was guilty of such negligence in the prosecution of his suit, as deprives him of the benefit of the rule which makes a *pendente lite* purchaser take subject to the decree. *Third*, that Watson's purchase having been made after the death of Ezekiel Benbrook, and before any revivor against his heirs, there was no *lis pendens*.

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A *pendente lite* purchaser, & the purchaser of the legal title to an estate, with notice of an outstanding equity, do not stand upon precisely the same footing.—*The former* is absolutely concluded by the decision of the pending suit—which might otherwise be rendered nugatory by alienations of the estate; and if the suit be not prosecuted successfully, the purchaser is not affected by it; it does not operate as notice to him. *The latter* acquires the legal title by his purchase, and can only be divested of it, by a suit upon the equity of which he had notice, and a decree against him.

It is a misconception of the rule for the protection of suitors against *pendente lite* alienations of the property sued for, to suppose that it rests upon the principle, or upon any analogy to the principle, which protects the holder of an equity, against a purchaser of the legal estate with notice. It is frequently said in the books, that *lis pendens* is notice; but, that is a loose mode of expression, not warranted by the reason or spirit of the rule. The best view of the subject we have met with, is couched in the following language of the Court of Appeals of Virginia, 2 *Randolph*. “The rule as to the effect of *lis pendens*, is founded on the necessity of such rule, to give effect to the proceedings of a court of justice. Without it, every judgment and decree for specific property, might be rendered abortive, by successive alienations. This necessity is so obvious, that there is no occasion to resort to the presumption of notice of the pendency of the suit, to justify the rule. In fact, it applied, where there might have been a physical impossibility that the purchaser could have known of the existence of the suit. For at common law, the writ was pending from the first moment of the day on which it bore teste, and a purchaser, on or after that day, held the property subject to the execution upon the judgment in that suit, as the defendant would have held it, if no alienation had been made. The court of chancery has adopted the rule, in analogy to the rule at common law, but relaxed in point of severity. This principle, however necessary, was harsh in its effects on purchasers, and was confined in its operation, to the extent of the policy upon which it was founded; that is, to the giving full effect to the judgment or decree, which might be rendered in the suit depending at the time of purchase. As a proof of this, if the suit was not prosecuted with effect, as if a suit at law was discontinued, or a suit in chancery dismissed for want of prosecution, or for any other cause not upon the merits, although the plaintiff might bring a new suit for the same cause, he must make him who purchased during the pendency of the former suit a party; and in this new suit, the purchaser would not be at all affected, by the pendency of



e former suit at the time of his purchase. If a *lis pendens* was notice, then it should bind the purchaser, like aetnal notice, in any subsequent suit prosecuted for the same cause; but, this it does not. English judges and writers have carelessly called it notice, because in the one single case of a suit prosecuted to judgment or decree, it had the same effect upon the interest of a purchaser as notice had, though for a different reason. But the courts have not in any case given it the real effect of notice."

Concurring in most, if not all, of this lucid exposition of the subject, we cannot deem a *pendente lite* purchaser, as standing in the attitude of a purchaser of the legal estate, with notice of an outstanding equity; but rather in that of a party, or at least of a privy, to the suit; for his rights are absolutely concluded by the final determination of the suit, as though he were a party or privy.

Whether in the ordinary case, where the legal estate is conveyed to a third person, pending a suit for the recovery of the property, the title will remain with him, notwithstanding the successful prosecution of the suit, subject to be divested by a new suit; or, the decree, and proceedings under it, are made by relation to take effect from the institution of the suit, so as totally to vacate and avoid the intermediate conveyance, is a question of some difficulty on the score of authority, and which, so far as we can learn, has never been distinctly presented and determined. It would seem to depend on the other question—whether the effect of the rule as to *lis pendens* is given in analogy to the same rule in a real action at law, as intimated by the Court of Appeals of Virginia, or to the liens, in favor of different judgments or executions. The enquiry, however, has more of nicety, than substantial utility, for if the result of the suit concludes the question of right, between the purchaser and complainant, as though the purchaser had been a party to the suit, it must be conclusive between them in any other litigation concerning the actual right to the property; and it can be of little moment, though, in legal contemplation, the mere naked title should remain with

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Whether a *lis pendens* purchaser acquires a title that remains in him, notwithstanding the termination of the suit against his right, requiring another suit against him, to divest him of the legal title: or whether his title is absolutely void and of no effect, is a question (of no great importance) not known to have been decided.—This court incline to the opinion, that such a title is absolutely void.

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A suit to subject an equitable estate to the satisfaction of a debt, creates a lien upon the estate, commencing with the institution of the suit, and overreaching all subsequent conveyances and levies

the purchaser, as he can exert it for no beneficial purpose whatever. Though there are cases and *dicta* that seem to give countenance to the idea, that the title does so remain with the purchaser, yet, it is difficult to understand how this can be, without putting at hazard the whole doctrine as to the effect of *lis pendens* in favor of the complainant; for it is well settled, that a decree is not notice, and, as after decree there is no longer a *lis pendens*, the purchaser might, after decree, successfully alienate to an innocent third person, so as to defeat the result of the complainant's suit; which would admit the very mischief the rule was made to obviate. This however, is an enquiry not necessarily called for in this case; for, according to the doctrine of *Scott vs. McMillan* and *Scott vs. Coleman*, the institution of the suit by the creditor, gives a specific lien upon the property which he seeks to subject to his judgment. The effect given to it, of squeezing out subsequent execution levies, could only have been given on the idea, that the institution of the suit created a specific lien similar to, and with the like effect of, the lien of an execution, which overreaches, and by relation, avoids subsequent alienations. There is no superiority of equity, as between the contending creditors. Each has equal right to make his debt out of the debtors property. The priority is only gained, by virtue of the priority in point of time, in obtaining the lien. The suit is not the mere enforcement of a direct lien upon the property, but itself originates and constitutes the lien, to effectuate which, to the extent allowed, it is obviously indispensable, to make the decree and the proceedings under it relate back to the institution of the suit. Subsequent purchasers under execution can stand in no better attitude, than mere *pendente lite* encumbrancers of an equity of redemption, who, it is well settled, the complainant need not bring before the court.

To a *lis pendens* purchaser, and to a purchaser with notice of an out-

Notwithstanding the distinction pointed out as to the two classes of cases, yet as to the degree of diligence with which they should be prosecuted, in order to secure the benefit of the lien or *lis pendens*, they should be govern-

ed by the same rule or principle. Whilst affording this lien, which is a mere creature of the court, in favor of the complaining creditor, it is most manifestly proper, that he should be held to at least the same diligence in prosecuting his suit, as is required to entitle a party to the benefit of his *lis pendens*. It remains, therefore, to determine the effect of the imputed laches, and of the abatement of Wilson's suit, as to Ezekiel Benbrook.

It is said by several writers, that in order to affect a purchaser, there must be a close and continued prosecution of the *lis pendens*. This has been said, as is presumed, mainly upon the authority of *Preston vs. Tubbin*, 1 Vern. 286; as no other case is found cited in support of the doctrine, or in which it has been distinctly acted upon. In that case, there is an observation, that there ought to be a close and continued prosecution of the *lis pendens*; but it seems to be the observation of the reporter merely, made for the purpose of indicating what the case decides. But the case decides nothing more, than that the pendency of a suit, at the time of purchase, does not affect the purchaser with notice, in any new suit, the first having been dismissed or discontinued. Lord Bacon's rule, which probably was the fountain of all this doctrine, by requiring that the suit should be in full prosecution at the time of the purchase, would seem to intimate, that there is a degree of intermission in such prosecution, which will deprive the complainant of the protection of the rule. All the writers concur in this idea; but, what degree of intermission will have this effect, it is impossible to ascertain from them, with any distinctness. In a case decided by Lord Clarendon, and cited with approbation by Lord Nottingham, the bill was filed in 1640, abated by a death in 1648, the purchase made in 1661, and the bill of revivor not filed till 1662; still, the purchaser was held bound. But this case, when subsequently cited, has been accompanied with the indication of decided disapprobation; and Mr. Sugden says, it was attended with circumstances, that strip it of all character as an authority upon the point in question. The case was cited by Sir William

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standing equity,
the same rules
as to diligence,
apply.

A pending suit, and an outstanding equity, must be alike prosecuted and asserted with diligence, to prevent a purchaser from being exonerated: but what degree of diligence is required, — and what suspensions may be allowed, has not been clearly defined: culpable negligence, in either description of case, would no doubt be fatal.—And —

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Grant, in *Winchester vs. Paine*, 11 Ves. 200, to shew Lord Nottingham's opinion, that it made no difference, though the purchase was during an abatement of the suit, if afterwards revived and prosecuted to a decree; but, at the same time, gave it as his own opinion, that in such case, there would be great difficulty in holding the purchaser bound; without however, suggesting any reason for such difficulty. Mr. Sugden, after noticing this intimation of opinion, suggests, "that if ever the point should call for a decision, it will probably turn upon the question, whether the plaintiff was guilty of laches in reviving the suit."

It was held by Lord Redesdale, that a purchase made after the dismissal of a bill, was subject to the final disposition of the cause in the house of Lords, provided an appeal was afterwards taken, and such is the received doctrine in England. We perceive no satisfactory reason why a purchaser during the temporary abatement of a suit, should not be affected in the same way. A suit like this, can with equal, if not greater propriety, be said to be pending, after an abatement by death, than after decree and before appeal in England, or writ of error in this country. The question seems properly resolvable, as suggested by Sugden, into an enquiry whether, the complainant was guilty of culpable negligence, in reviving his suit.

Where a suit has been instituted to subject an estate to the satisfaction of a debt, and a defendant dies, if the complainant fails to revive the suit within a reasonable time, he may lose the benefit of the lien created by the suit; and one who purchases the estate between the abatement and revivor, but after a lapse of

As to the negligence objected to in this case, we are not prepared to say, nor does our experience of the ordinary progress of a chancery suit, in this state, authorize us in saying, that from May, 1825, when the subpoena was served, till April, 1828, when Watson obtained his deed, there was that lapse of time, which, unexplained, would of itself amount to such laches, as to deprive the complainant of the benefit of the rule.

But the delay in reviving the suit, of nearly two years, to the time when Watson completed his purchase, and of more than two years to the time of revivor, without any step taken towards a revivor, and without any explanation or excuse shewn for the delay, is of a different character. If such delay, for two

years, does not need explanation, we should have much difficulty in saying what length of delay would require it. No satisfactory reason suggests itself, for saving it from the inculpation of gross and wilful negligence. We are, therefore, bound to say, that there was not such a prosecution of Wilson's suit, as entitles him to the protection of the rule, and that his decree, and purchase under it, cannot be permitted to overreach and avoid the conveyance to Watson. The rule, though necessary and indispensable, has ever been deemed harsh and rigorous, in its operation against *bona fide* purchasers; and it is said, that, in England, if the complainant, "make a slip in his proceedings, the court will not assist him to rectify the mistake." We deem it strictly proper, that he should be held to something like reasonable diligence in the prosecution of his suit, to entitle himself to the protection of the rule.

The judgment must be reversed, with costs, and the cause remanded, with directions to again submit it to a jury, pursuant to the terms of the agreed case, and with instructions, that upon the facts agreed, Watson's purchase is valid, and that he thereby obtained the title of Ezekiel Benbrook; and to permit Wilson, if he can do so satisfactorily, to adduce proof in excuse of the delay in reviving his suit against the heirs of Benbrook.

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time, within which it ought, *prima facie*, to have been revived, may hold it notwithstanding the *lis pendens* subsequently revived, unless the comp'tant can show a good excuse for his delay in reviving.

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ASSUMPSIT.

Early vs. McCart.

[Mr. Crittenden for the Appellant ; no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR FLEMING COUNTY.

November 8. Chief Justice ROBERTSON delivered the Opinion of the Court.

The action, form of the bill sued upon, declaration, and decision of the circuit court.

EARLY, as endorsee, sued McCart, in *assumpsit*, on the following instrument, treated and described in the declaration, as an inland bill of exchange :—"Pay to Alexander and Stockton, or order, two hundred and fifteen dollars, and I will credit your note to me for that amount, due on the 25th instant—value received.

August 24th, 1833.

To Mr. John Andrews. }
 Sherburn Mills. }

Robert McCart."

On which was the following endorsement :—towit, "Pay the within to Jacob D. Early, for value received."

Alexander and Stockton.

On demurrers to pleas filed by McCart, the circuit court decided, that the declaration was insufficient ; *first*, because the instrument declared on was, in the opinion of that court, an order drawn on a particular fund, and was not, therefore, a bill of exchange ; and *second*, because there was no averment of consideration. And thereupon judgment was rendered against the plaintiff in the action, now appellant.

As the sufficiency of the declaration is neither questioned, nor questionable, in any other respect, we will only consider the objections which seem to have influenced the judgment of the circuit court.

Inserting in a bill of exchange, a promise that the drawer will credit the drawee's note with the amount, does not make it a bill drawn on a particular fund ; it leaves the drawee to pay as he can, and at all events ; and does not affect the mercantile character of the bill. --- An order on a particular fund, the payment depending on the sufficiency of the fund, is not a valid bill of exchange ; but if it is *payable at all events*, not upon a condition or contingency, though it may refer the drawee to a particular fund for reimbursement, it is, to all intents, a bill of exchange.

ey or other means of the drawee, with which the debt would be paid, or the bill honored, could not be deemed a *fund* of the drawer's, the document cannot be considered an order drawn on a *particular fund*; but should be deemed a bill drawn on the general credit of the drawer. It has all the requisites of a bill of exchange; it is negotiable on its face, and is payable without any contingency. *Chitty on Bills, seventh American, New York, Edition*, from 41 to 50 inclusive. The reference to the drawee's indebtedness should be considered as only a designation of the mode of reimbursement or indemnity.—*Ib.* 49. And, even if the bill should be deemed to have been drawn on a particular fund, still, as that fund was certain, and the event on which the payment depended, to wit, the drawee's indebtedness at that time, or before the time of payment, is stated to be, or may be presumed to be, equally certain, it is a good bill of exchange. *Ib.* 47—8—9; *Bank of Kentucky vs. Sanders, 3 Marshall, 184.*

Second. As the document is a bill of exchange, the averment of a consideration was not necessary; because, according to the policy and doctrines of mercantile law, a consideration is implied, and need not be averred in a declaration on a bill of exchange.

Unless, therefore, one of the pleas be good, the judgment of the circuit court was erroneous.

If either plea be good, it is that which avers, that the bill was procured from the drawer by fraud, and without any consideration. Although that plea is, in effect, but the general issue of *non assumpsit*, it will not now be objected to on that ground. But, whether it be considered as a plea of fraud, or of no consideration, or of both, however deficient it may be in form, it is, in our judgment, more fatally so in substance.

Although, as between the immediate parties to a bill, as drawer and payee, endorser and endorsee,—fraud, or want of consideration, may be a good defence; such

circumstance appeared, such a defence will not avail: but proof of fraud, or want of consideration, will put it upon the plaintiff to prove that he is an innocent holder, for a valuable consideration. Gaming and usurious considerations are exceptions to the general rule, and render the bill entirely void—even in the hands of a *bona fide* holder, without notice.

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A consideration for a bill of exchange, is implied, and need not be averred, in the declaration.

To an action on a bill, against a defendant who passed it to the plaintiff, fraud, or want of consideration, may be a good defence. Against an innocent holder (as a subsequent endorsee, without notice) who obtained the bill, for a valuable consideration, before it was due, or any suspicious

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matter is not available as between the drawer and an innocent endorsee, or holder, for a *valuable consideration*, to whom the bill had been transferred before its time of payment had elapsed, or before it had been otherwise degraded or rendered suspicious. This is the well settled doctrine of the *lex mercatoria* applicable to such cases. *Chitty on Bills* 85—6 ; 3 *Kent's Com.* 79—80 ; 1 *Wheaton's Selwyn*, 262—266.

The same authorities and others, however, abundantly show, that proof of fraud, or of no consideration, or of an illegal consideration, as between drawer and payee, or any other proof tending to throw suspicion on the title of the endorsee, will throw on him the burthen of showing that he is an innocent holder, for a valuable consideration. A gaming, or usurious consideration, is an exception from the general rule, because, as each of them is declared by statute as sufficient to render the bill altogether void, either will be a good defence even against a *bona fide* endorsee for valuable consideration.

A plea of fraud, or of want of consideration, to an action on a bill of exchange, against any other party than that from whom the pltf. receiv'd the bill, must, besides averring the fraud, or want of consideration, aver that the pltf. gave no value for it; or that he had notice of the fraud, or notice that there was no consideration, and the bill not drawn for the accommodation of the payee.

But though, under the general issue of *non assumpsit*, proof of fraud, or of no consideration, as between the drawer and payee, might have imposed on the plaintiff in this action the burthen of showing, that he was a holder for a valuable consideration and without notice, we are of the opinion, that the special plea of fraud, or of no consideration, is insufficient, and does not require a replication, because, admitting every allegation which it contains, still it may not bar the action. Such a plea should, in addition to fraud, or want of consideration, aver that the endorsee had given no value, or had notice of the fraud, or notice that there was no consideration, and that the bill was not drawn for the accommodation of the payee, so as to show that, if the allegations of the plea be true, or be admitted, the action cannot be maintained. The plea in this case contains no such averment; and we are therefore of the opinion, that it is insufficient, and that the plaintiff was not bound to reply to it.

Wherefore, the judgment must be reversed, and the cause remanded for a new trial.

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Gregory vs. The Commonwealth.

INDICTMENT.

[Mr. C. A. Wickliffe for the Plaintiff: Atto. Gen. Morehead for the Commonwealth.]

FROM THE CIRCUIT COURT FOR WASHINGTON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court, November 8.

THIS writ of error is brought to reverse a judgment, for ninety six dollars, on an indictment against Godfrey Gregory, for making and continuing, for a specified period, a fence in a common highway, whereby the said highway was obstructed.

The act (of '97) concerning public roads, declares that—"where any fence shall be made across, or in, any public road, the owner or tenant of the land shall pay" the penalty: no other person is made liable, & no indictment can be maintained *under the act*, unless it charges that the accused was the owner or tenant of the land.

The indictment concludes with the words "against the statute, in such cases made and provided." The only statute which could apply to such an obstruction as that charged, is a statute of 1797, declaring that "when any fence shall be made across or in any public road, the owner or tenant of the land shall pay six shillings for every twenty four hours the same shall be continued." The indictment does not contain a charge which can be deemed a violation of that enactment, because, waiving other reasons, it does not allege or show, that Gregory was either the owner or tenant of the land on which the fence was made. Unless he was the owner or tenant, he was not indictable under the statute; and, therefore, the circuit court erred in instructing the jury, that they were bound to find against him, six shillings for every twenty four hours.

A fence in a road, is a nuisance, at common law; and he who builds it may be fined and imprisoned.

But the facts charged amount to a *nuisance* at common law; and it is now well settled, that the conclusion "against the statute" may be rejected as surplusage, when, although the indictment is professedly framed upon a statute, yet the facts charged are not sufficient

An indictment for a misdemeanor, describing an offence at common law, but not within any statute, may be maintained, notwithstanding.

ing it concludes 'against the statute in such cases made and provided:' as that may be rejected, as surplusage.—The Court of Appeals has no jurisdiction of any criminal or penal case in which imprisonment may be imposed. An indictment for obstructing a highway, at common law, is such a case.—A writ of error in a cause where the Court of Appeals has no jurisdiction, will be quashed.

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under the statute, but amount to an indictable offence at common law; and that, on such indictment, there may be a trial and conviction, according to the common law. 1 *Chitty's Criminal Law*, 288.

It is equally well settled, that the common law punishment for obstructing a common highway, is fine and imprisonment. 1 *Hawk. Pleas of the Crown*, 695; *Russel on Crimes*, 305.

And it has been frequently decided, that this court has no jurisdiction in a criminal or penal case, in which imprisonment is any part of the penalty or punishment for the offence charged.

Consequently, as the indictment charges an offence, not punishable by any statute, but which is a violation of the common law, and as the punishment for the offence charged is fine and imprisonment, the judgment of the circuit court, although evidently erroneous, cannot be revised by this court.

Wherefore, the writ of error must be quashed, for want of jurisdiction in this court.

INDICTMENT.

The Commonwealth vs. Hopkins.

[Atto. Gen. Morehead for the Commonwealth: Mr. M. C. Johnson for the Defendant.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

November 8. Judge UNDERWOOD delivered the Opinion of the Court.

Upon the trial of one indicted as a common gambler, evidence that "he was and is by reputation a common gambler," is not admissible: his

HOPKINS was indicted as a common gambler. Upon the trial, the attorney for the commonwealth introduced a witness, and offered to prove by him, that the accused, "was and is by reputation a common gambler." The court decided, that such evidence was incompetent, and excluded it. On this point, we concur with the circuit court.

It is the general course of conduct, in pursuing the business or practice of unlawful gaming, which constitutes a *common gambler*. A man's character is, no doubt, formed by, and results from, his habits and practices; and we may infer, by proving his character, what his habits and practices have been. But we do not know any principle of law, which sanctions the introduction of evidence to establish the character of the accused, with a view to convict him of offending against the law, upon such evidence alone. If the statute had made it penal to possess the *character* of a common gambler, the rejected testimony would have been proper. But we apprehend, that the question whether a man is, or is not, a common gambler, depends upon matters of fact—his practices, and not his reputation or character; and therefore, the facts must be proved, as in other cases.

The attorney for the commonwealth offered to prove by a witness, that the accused "had played at cards for money," since February, 1833, and before the finding of the indictment. The court rejected the evidence, and we think erroneously. How many acts there were, of playing and betting, or the particular circumstances attending each, cannot be told, in as much as the witness was not allowed to make his statement. Every act, however, of playing and betting at cards, which the testimony might establish, would have laid some foundation on which the *venire* could have rested, in coming to the conclusion whether the general conduct and practices of the accused did, or did not, constitute him a *common gambler*. One, or a few acts, of betting and playing cards might be deemed insufficient, under certain circumstances, to establish the offence. For instance, if the accused, during intervals between the times he played and bet, was attending to some lawful business—his farm, his store, or his shop, it might thereby be shown, that his playing and betting were for pastime and amusement merely. Under such circumstances, the evidence might fail to show, that the accused was a *common gambler*. Thus, while many acts of gaming may be palliated, so as to show that the general conduct and practices of an individual, are not such as to constitute

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acts, not his
character, are
to be proved.—
(*Ante* 402.)

Evidence of a single instance of unlawful gaming, may go to the jury, upon the trial of one indicted as a common gambler, and, with other circumstances, e. g. that he displayed gaming implements &c., might warrant a conviction;—while proof of many instances of playing, accompanied with evidence that the accused pursued a lawful calling, and only played for pastime, might not.

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him a *common gambler*; on the other hand, a single act may be attended with such circumstances as to justify a conviction. For example, if an individual plays and bets, and should at the time display all the apparatus of an open, undisguised, common gambler, it would be competent for the jury, although he was an entire stranger, to determine that he fell within the provisions of the statute. The precise nature of the acts which the testimony would have disclosed, had it been heard, is unknown; but we perceive enough to convince us, that it was relevant, and ought to have been heard.

The facts which may be given in evidence against one indicted as a common gambler, are not merely those perpetrated within the county where the bill is found; it may be shown that he had kept a faro bank or gaming table, or otherwise been guilty of unlawful gaming, in other counties.

The attorney for the commonwealth offered to prove by a witness, that the accused had, within the period aforesaid, set up and kept faro banks and other gaming tables, at which money was bet, and won and lost, at places without the county of Fayette. The court decided, that the commonwealth could prove no such gaming, except it had taken place within the county of Fayette, where the indictment was found, and excluded the testimony. In this, the court clearly erred. It makes no difference where the gaming takes place. If a person has gamed until he is a common gambler, without the county of Fayette, he may go to that county for the purpose of continuing his practices. In such case, it was the object of the statute to arrest him as soon as possible by conviction; and requiring the bond provided for in the sixth section of the act of 1833. The testimony should have been admitted.

Judgment reversed, with costs, and cause remanded for a new trial.

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CHANCERY.

2d 431
98 633**Banton and Wife *against* Campbell's
Heirs, &c.**

[Mr. Turner for Plaintiffs: Mr. Owsley for Defendants.]

FROM THE CIRCUIT COURT FOR MADISON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court. *November 10.*

ON a bill in chancery, filed by John Banton and his wife, who is one of the heirs and distributees of Samuel Campbell, deceased, against her co-heirs and co-distributees, for a partition of the land, and distribution of the slaves and personalty to which, as heirs and distributees, they were entitled,—the circuit court, in 1823, directed a sale of the slaves, preparatory to distribution; and in 1824, decreed, that eight of the ten heirs (two of the ten having received advancements in land, which they refused to throw into hotchpot,) were entitled to partition of the land remaining for partition, and appointed commissioners to make the allotments. In 1825, the land having, in the mean time, been allotted, and the slaves sold, in pursuance of the former decrees, the allotments and the sale, as reported to have been made, were approved and confirmed; and thereupon, the court decreed, that deeds of partition should be made, and that the *ten* distributees were entitled to distribution of the personalty, and of the proceeds of the sale of the slaves; and, for effectuating the latter decree, appointed commissioners to settle with the personal representatives, to ascertain how much each distributee had previously received, and then to make a just and equal distribution among them *all*. These commissioners having reported the amounts to which the ten distributees were found to be respectively entitled, the court, at its February term, 1832, approved and confirmed that report; and decreed, *first*, that the administrators and the commissioners who had sold the slaves should pay to each of the ten distributees the

Statement of the case, and various orders and decrees, made at different times, in the progress of the suit, in the court below—the reversal of all of which is sought, and as to some of which, the statute of limitations, barring writs of error, is pleaded.

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Banton &c.

vs.

*Campbell's
heirs &c.*

Every order or decree made in a chancery cause, which decides upon, and settles the rights of the parties, as to any particular matter, is so far final; an appeal or writ of error may be prosecuted upon it—although the suit remains in the court below, for other matters in the bill to be adjudicated upon; and the time to bar a writ of error upon any such order or decree, is to be computed from its date—not from the date of the last decision in the cause.

The joint right of husband and wife to a writ of error, is not saved from the bar by time, by the coverture.

To close a chancery cause, and leave the intentions of the ct. to be carried in to effect, by commissioners, in the country, is erroneous: the cause should be retained until the court is satisfied that the commissioners have paid over the funds in their hands &c.

amount thus reported; and, *second*, that the administrators should reserve in their hands, a fund sufficient to pay all the costs of this suit, and the *reasonable* fees of "counsel."

This writ of error, brought to reverse all those decrees, was sued out in May, 1834, and the defendants, insisting that the decree of 1825 was, as to the partition of the land and the right to distribution of the personality and the proceeds of the sale of the slaves among all the ten distributees, so far final, have, to that extent, pleaded the statute of limitations.

The decree of 1824, and especially that of 1825, must be deemed to have been final, as to the partition, and the rights to partition of the land. And, in the judgment of this court, the decree of 1825 should also be deemed to have been final, so far as it settled the rights to distribution, or ascertained and decided who were entitled to distribution. From such a decree, fixing the right, either party might have appealed at once, without waiting for an execution of the decree by the commissioners appointed to carry it into effect.

And we are of opinion, that the coverture of Mrs. Banton did not prevent the running of the statute of limitations against the joint right of herself and husband, to prosecute a writ of error.

Wherefore, as to the partition, and the rights of the parties to distribution, fixed by the decrees of 1824 and of 1825, it is the judgment of this court, that the writ of error in this case is barred by lapse of time.

But as to the actual distribution afterwards made, and approved by the decree of 1832, and as to the details of that decree itself, in other respects, the writ of error is not barred.

This latter decree is, in our opinion, erroneous.

As no exception seems to have been made to the report made by the commissioners, that report will not now be enquired into. But, that being the basis of the decree, still it was erroneous to close the case in the circuit court, and leave to the commissioners the discre-

tion, of carrying the intention of the court into effect afterwards, in the country. They were no parties.

And, moreover, it was erroneous to give to the administrator the discretion to determine what were reasonable fees to counsel, and to retain a fund for that purpose. This matter ought to have been settled, before the chancellor let go the case; and he should have retained the case in court, also, until he had been satisfied that the commissioners had distributed the fund in their hands, in conformity with the decree. And it would have been more proper, too, to have designated, in the decree, the amount to which each distributee was entitled, and not have left it to the administrator and commissioners, to ascertain the amount from the report.

Wherefore, the decree of 1832, must be reversed, and the cause remanded, for such proceedings and decree for effectuating the decrees of 1824 and of 1825, as, according to this opinion, shall be necessary and proper.

Fall Term
1834.

To authorize an adm'r to retain a *reasonable* fee to be paid to counsel, leaving the adm'r to determine what is reasonable, is erroneous.

A decree for the distribution of money among heirs, should show how much each is entitled to: it should not be left open, for adm'r's or commissioners, to ascertain the respective portions.

Warner vs. Smith and Hart.

[Mr. Sayre for Plaintiff: Mr. Hunt and Mr. M. C. Johnson for Defendants.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

November 10.

A nonsuit was suffered; and thereupon the circuit court rendered judgment against the plaintiff, in favor of the defendants, for seven dollars and fifty cents, instead of one hundred and fifty pounds of tobacco, and the costs of suit. The only question is, whether the judgment for the seven dollars and fifty cents be correct or not.

The forfeiture for a nonsuit, is 150 lbs. of tobacco: the act of '95, which allowed 45s. was repealed by the act of '96.

The twenty second section of the act of 1795, entitled an act to establish district courts, provides, that the plaintiff, if he be nonsuited, shall pay the defendant, forty five shillings, equal to seven dollars and fifty cents.

Fall Term
1884.

Warner

vs.

Smith &c.

The twentieth section of an act approved December 19th, 1796, entitled "an act to reduce into one the several acts for preventing vexatious suits, and regulating proceedings in civil cases," provides, that the plaintiff, if he fail to prosecute his suit, "shall be nonsuited, and pay to the defendant, or tenant, (besides costs,) one hundred and fifty pounds of tobacco, &c." We are of opinion, that the latter act virtually repeals the former, and constitutes the only rule of practice in cases like this. If both acts are in force, then a defendant, where the plaintiff is nonsuited, is entitled to have both the seven dollars and fifty cents, under the first, and the one hundred and fifty pounds of tobacco, under the second; for there is no provision which limits the defendant to the money alone, or tobacco, without the money, as the defendant may elect. The twentieth section of the act of 1796, substituted one hundred and fifty pounds of tobacco for the seven dollars and fifty cents, given by the twenty second section of the act of 1795, and since the change, the tobacco alone is recoverable upon a nonsuit.

The limited extent of a county,—of which the court takes notice,—repels a presumption that an allowance was made, by the court below, to a party, summoned within it, for travel.

It is suggested that the judgment is right, because the court may have made an additional allowance to the defendants, in consequence of their residence being more than twenty five miles from the court house. The service of the process on the defendants in Fayette, where the judgment was rendered, negatives the truth of the position assumed.

Judgment reversed, with costs, and cause remanded with directions to enter judgment in conformity with this opinion.

Fall Term
1884.

Campbell vs. Threlkeld.

CASE.

[Messrs. Sanders and Depew for Plaintiff: no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR OWEN COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

November 10.

CAMPBELL sued Threlkeld, in detinue, for a slave; and also filed her bill against him, alleging her apprehension that he would remove the slave out of the state; upon which she obtained an order requiring the sheriff to take the slave into custody, to abide the event of the action of detinue, unless Threlkeld would give bond and security to have the slave forthcoming. Threlkeld failing to give the bond, the sheriff took the slave into custody, and kept him until the termination of the suit, about two years thereafter. Campbell failed to recover in the action of detinue, and her injunction was ultimately dissolved, and her bill dismissed. Threlkeld then brought this action on the case, against Campbell, for the malicious prosecution of the bill in chancery, whereby he alleges, that he sustained damage in the loss of the use and hire of the slave.

Statement of the case.

On the trial, he adduced nothing but the facts above stated, conducing to show that the suit was maliciously prosecuted; and the defendant thereupon moved an instruction as in case of a nonsuit, which was overruled. The court, also, refused to permit the defendant to prove facts conducing to show, that the suit had not been instituted through malice.

The motion for a nonsuit should have prevailed. It appears to be well established, that it is not sufficient for the plaintiff, in this kind of action, to show that the suit has terminated in his favor; but he must furthermore sustain, by additional proof, the essential allega-

An action for prosecuting a malicious suit, is not sustained by mere proof, that the plaintiff in the suit complained of, was

defected: the malice and want of probable cause, must also be shown. The defendant, of course, may introduce evidence, conducing to show, that there was no malice, and that there was probable cause.

Fall Term
1834.

Pate
vs.
Barrett et al.

tion, that the suit was *maliciously* prosecuted, without probable cause. Of course, it is competent for the defendant to prove, there was no malice, and that there was probable cause.

Judgment reversed, with costs, and cause remanded with instructions for a new trial, and further proceedings consistent herewith.

DETINUE.

Pate vs. Barrett and Wife.

[Mr. Crittenden for the Plaintiff: no appearance for Defendants.]

FROM THE CIRCUIT COURT FOR BRECKINRIDGE COUNTY.

November 10. Judge NICHOLAS delivered the Opinion of the Court.

A slave is devised to a daughter for life, and, at her death, to give it to any of her children, or emancipate it; the daughter having died without exercising the power, acquired but a life estate, and the right to the slave reverts to the deviser's executor.

Non-residents were excepted from the statute limiting personal actions, until they were placed on the same footing with residents, by the act of 1823; and the computation of time against a party who has never been in

JAMES MASON of Virginia, by his will, made the following devise. "To my sister, Janet Crawford, I leave my mulatto girl Nelly, during her life, and at her death, to leave Nelly to any of her children she may think proper, or free her by emancipation, as she pleaseth."

Samuel Crawford, the husband of Janet, obtained Nelly from Mason's executor, in Virginia, and brought her with him to Kentucky, in 1809 or 1810, and retained possession of her and her increase till his death, in 1821; when she, together with a child of hers called Hannah, were delivered to Pate, as part of his distributable share, in right of his wife, of the estate of Samuel Crawford, who has held possession of them ever since. Janet Crawford died in 1813, without having executed the power given her by Mason's will, of disposing of Nelly.

Shortly after the birth of Hannah, in 1819 or 1820, Samuel Crawford gave her to Mrs. Barrett, then an infant and unmarried, who resided with him at the time, and so continued till his death. In 1832, Barrett and wife instituted this action against Pate, for the recovery

1823?

of Hannah, and ultimately obtained a verdict and judgment against him. Mrs. Barrett did not attain full age till within five years next before the institution of the suit. The executor of Mason continues to reside in Virginia, and has never been in this state.

Upon proof conducing to show the foregoing facts, the court instructed the jury, that if Nelly was in Samuel Crawford's possession for five years next before his death, he claiming her as his own, and exercising acts of ownership over her, that this vested the title in him; and refused to instruct them, at the instance of Pate, that the statute of limitations did not commence running against Mason's executor, till 1823. A motion for a new trial was overruled.

We think the proof did not authorize the verdict, and that the court erred in the instruction given, and in refusing that asked by the defendant.

The will gave Janet Crawford only a life estate in Nelly, with power to emancipate her, or give her to any of her children, and as this power never was executed, the right to Nelly reverted to the executor of Mason, on the death of Janet Crawford.

The executor never having been in Kentucky, the statute of limitations did not commence running against him until 1823, when the exception in favor of non-residents was abolished. Samuel Crawford did not, therefore, obtain any title by virtue of the statute of limitations, and there is no other mode by which it is pretended he did acquire title. Consequently, he had no right whatever to Hannah, at the time he made the gift to Mrs. Barrett.

It is true, the statute has been running in favor of Pate since 1823, and it may, before the institution of this suit, have barred the right of Mason's executor. But we do not perceive how that can benefit the claim of Barrett and wife. If one having no title to a slave gives it to another, and afterwards acquires the title, it may be that the title will enure for the benefit of the donee. But Samuel Crawford, not only had no title at the time of the gift, but never afterwards acquired any right to the slave.

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1834.

the state, cannot be carried back beyond the date of that act.

A party holding a slave which belongs to another, gives it away, but retains the possession until his death, which occurs before the right of the true owner is barred by lapse of time; upon which, his adm'r delivers the slave, as distributable estate, to one of the distributees; who retains the possession until time has barred the right of the true owner: — the donee cannot recover it of the distributee, for as the donor never had any title, the donee acquired none by the gift; and the statute of limitations, operates in favor of the party in possession.

Where one sells real estate, with warranty, the heir, to whom sufficient assets descended, is estopped to deny the right of his ancestor to convey, because of the warranty. But this principle does not apply to a parol gift of a chattel, for there the law does not imply any warranty.

Fall Term
1884.

Stevens' heirs
vs.
Stevens' widow.

Where one having no title to real estate, undertakes to convey it, with covenant of warranty, his heir may, if sufficient assets descend to him, be estopped, to deny that he had right to convey; but this is only by virtue of the warranty, and assets descended. Therefore, even though it were conceded, that this doctrine were applicable to a conveyance of personalty, and to a distributee acquiring it by distribution, still it could not be made to apply in this case, for the benefit of Barrett and wife. For the law would imply no warranty, from a mere parol gift of the slave. The title by which Pate now holds the slave, is one acquired by himself, by virtue of the statute of limitations operating upon his own possession, and is wholly unaided by any right derived from Samuel Crawford. Pate's possession, though derived from the personal representative of Crawford, can by no construction, be made the possession of the personal representative, so as to mature a right for him, but would, if necessary for Pate's protection, be construed into an adversary holding against the representative.

Judgment reversed, with costs, and cause remanded, with instructions for a new trial, and further proceedings consistent herewith.

MOTION.

Stevens' Heirs' vs. Stevens' Widow.

[Mr. Turner for Plaintiffs : Mr. Simpson *contra*.]

FROM THE MADISON COUNTY COURT.

November 11.

Judge UNDERWOOD delivered the Opinion of the Court

Persons who do not appear, by the record, to have been parties in the court below, and do not show, by proof, that they are connected in interest as heirs,

THE Madison County Court, on the motion of the administrators of James Stevens, deceased, appointed commissioners to allot to Elizabeth Stevens, the widow, her dower in the estate.

The commissioners made a very vague report, which the county court "ordered to be recorded," without stating that it was approved or confirmed.

To reverse these proceedings, various persons sue out a writ of error, as plaintiffs, against Elizabeth Stevens, the widow, as defendant. There is no proof that the plaintiffs in error are the heirs of James Stevens, deceased. They are not, upon the face of the record, connected with the proceedings; and they do not even prosecute their writ of error, in the character of heirs. Presenting themselves in the attitude of strangers, and showing no interest whatever, the writ of error sued out by them, must be quashed. It is not perceived how they can be prejudiced, if they are in truth the heirs of James Stevens, deceased, by proceedings commencing illegally, and to which they were not parties, and which the widow seems to be protesting against as well as they.

Administrators have no right, or authority, to apply for the appointment of commissioners to assign dower.

The writ of error is quashed. The defendant in error must recover her costs.

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1834.

or otherwise, can maintain no writ of error, and one sued out in their names, will be quashed.

Administrators have no authority to procure an assignment of dower: the widow and heirs are not bound by proceedings upon their motion.

The Commonwealth, for Sanders, vs. Herndon (sheriff,) and his sureties.

DEBT.

[Messrs. Sanders and Depew for Plaintiff: Messrs. Morehead and Brown for Defendants.]

FROM THE CIRCUIT COURT FOR SCOTT COUNTY.

JUDGE UNDERWOOD, delivered the Opinion of the Court.

November 11.

THIS action was instituted upon the official bond of Herndon, to render him liable for a slave sold under execution, purchased by Sanders, and afterwards recovered from him by the true owner, in an action of detinue.

A jury was empannelled to try the right of property, and upon their failure to render a verdict, the sheriff sold the slave. It seems that the jury informed the sheriff they could not agree, and dispersed.

When a sheriff summons a jury to try the right of property, and they cannot agree, the claimant fails to succeed, the sheriff is bound to sell, and is not liable to any suit on account of such sale.

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1884.

Robertson &c.
vs.
Kennedy.

The liability of the sheriff to Sanders, if there be any, grows out of the sale of the slave to him.

The act of 1803, 2 Dig. 1047, makes it the duty of the sheriff to sell the property, where the claimant does not succeed in establishing his right before the jury. If there is no verdict rendered in favor of the claimant, it cannot be said that he succeeds. Consequently, in such a case, the sheriff should sell; and if he does, the act declares he shall "not be liable to any suit on account of such sale." This suit is an attempt to make him liable, contrary to the letter and spirit of the statute, and cannot be sustained.

No costs.

Judgment affirmed, but without costs, as defendants are in default.

CASE.

Robertson and Co. vs. Kennedy,

[Mr. Calhoun for Appellants: Mr. Chespeze for Appellee.]

FROM THE CIRCUIT COURT FOR MEADE COUNTY.

November 11.

Judge NICHOLAS delivered the Opinion of the Court.

Common carriers are accountable for the goods which they undertake to carry, unless the loss or damage is the result of inevitable accident, or the act of God.

Those who make a business of transporting goods, for pay, from place to place, (by themselves or servants,) including draymen, cartmen, porters, drivers of ox-teams &c.—

ROBERTSON and Co. sued Kennedy, in case, for the loss of a hogshead of sugar, which he, as a common carrier, had undertaken, for a reasonable compensation, to carry from the bank of the river, to their store in Brandenburg.

On the trial, plaintiffs introduced proof conducing to show that defendant had been in the habit of hauling for hire, in the town of Brandenburg, for every one who applied to him, with an ox team, driven by his slave; that he had undertaken to haul for plaintiffs the hogshead in question, and that, after defendants slave had placed the hogshead on a slide for the purpose of hauling it to plaintiffs store in Brandenburg, the slide and hogshead slipped into the river, whereby the sugar was spoiled. They then moved the court to instruct

2d 430
Case 2
116 911
2d 430
Case 2
116 911
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Case 2
1120 736
120 736

the jury, in substance, that if they believed this proof, the defendant was responsible for the loss of the sugar, unless it had occurred from inevitable accident, or the act of God. This instruction the court refused to give; but instructed the jury that defendant was responsible, if the sugar was lost through negligence, or from want of reasonable care.

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1834.

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vs.

Kennedy.
are common carriers.

The law is as contented for by the plaintiffs. Every one who pursues the business of transporting goods for hire, for the public generally, is a common carrier. According to the most approved definition, a common carrier is one, who undertakes, for hire or reward, to transport the goods of all such as choose to employ him, from place to place. Draymen, cartmen and porters, who undertake to carry goods for hire, as a common employment, from one part of a town to another, come within the definition. So also does the driver of a slide with an ox team. The mode of transporting is immaterial. The law imposes upon a common carrier the responsibility of an insurer, which requires a safe delivery at all events, unless prevented by public enemies, or such inevitable accident as lightning, tempests and the like, which are usually termed the acts of God.

The court erred in refusing the second instruction asked by the plaintiffs.

Judgment reversed, with costs, and cause remanded with instructions for a new trial, and further proceedings consistent herewith.

Fall Term
1834.



Barringtons (coloured persons) vs. Logan's Administrators.

[Mr. Crittenden for Appellants : Messrs. Wickliffe and Wooley for Appellees.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

November 12. Chief Justice ROBERTSON delivered the Opinion of the Court.

An agreed case --presenting the question whether the appellants are slaves, or free persons.

THIS is an agreed case, in which the only question presented, is the *liberty or slavery* of the appellants—*Winney Barrington, Julian Barrington, and Henry Barrington*; who are the children of *Dinah Barrington*, a woman of colour, who was born in the State of Pennsylvania, in March, 1800, but was afterwards brought to Kentucky, where, before she was twenty eight years old, she gave birth to the appellants.

This question depends altogether on another question; that is, whether *Dinah*, the mother, was a free woman, or a slave, when the appellants were, each of them, born; or whether, as the circuit judge seems to have thought, she was a slave until she had attained twenty eight years of age.

Law of Penn. on which the appellee's right to freedom, depends.

A statute of Pennsylvania, enacted on the first of March, 1780, for the gradual abolition of slavery within that Commonwealth, contains the following provisions, and which are the only legal provisions which can materially affect the question now to be decided.

“*Sec. III.* All persons, as well negroes and mulattoes as others, who *shall be born* within this state, shall not be deemed and considered as servants for life, or *slaves*; and all servitude for life, or *slavery of children*, in consequence of the slavery of their mothers, in the case of all children born within this state, from and after the passing of this act, as aforesaid, shall be, and hereby is, *utterly taken away, extinguished, and forever abolished.*”

“*Sec. IV.* *Provided always*, that every negro and mulatto child, born within this state, after the passage of this

act, as aforesaid, (who would, in case this act had not been made, have been born a servant for years, or life, or a slave,) shall be deemed to be, and shall be, by virtue of this act, the *servant* of such person, or his assigns, who would in such case have been entitled to the service of such child, until such child shall attain unto the age of twenty eight years, in the manner and on the conditions whereon servants *bound by indenture for four years*, are, or may be, retained or holden; and shall be liable to like correction and punishment, and entitled to like relief, in case he or she be evilly treated by his or her master or mistress; and to like freedom, dues and other privileges, as servants bound by indenture for four years are or may be entitled; unless the person, to whom the service of any such child shall belong, shall abandon his or her claim to the same; in which case, the overseers of the poor of the city, township, or district, respectively, where such child shall be so abandoned, shall, by indenture, bind out every child so abandoned, as an *apprentice*, for a time not exceeding the age herein before limited for the service of such children."

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1834.

Barringtons
vs.
Logan's adms

Looking either to the letter, or to the evident end and policy, of the statute from which the foregoing provisions have been quoted, we can have no difficulty in understanding the true import and effect of that enactment. It was intended to be a charter of universal liberty, within the limits of Pennsylvania, thenceforth and forever—excepting *only* as to such persons as were *then* slaves. The great end of the statute—that is, the ultimate extirpation of slavery—could never be accomplished, if persons born after its enactment, should be deemed to be slaves until they respectively attained the age of twenty eight years. The act was altogether prospective; and the legislature evidently intended that, as soon as all those who were then slaves should become extinct, or be removed from the state, slavery itself should be extinguished in Pennsylvania. And this obvious intention is perfectly consistent with the most literal construction of the act. All persons born in Penn. since the act of that state, for the gradual abolition of slavery, took effect, in 1780, were born free. Those *then* in slavery there, continued so. Children born afterwards, who but for the act would have been slaves, became apprentices—with all the liabilities and immunities of white apprentices—bound to serve those to whom as slaves, they would have belonged, until they attained 28 years of age: unless those entitled to their services, as apprentices, abandoned them, when they were to be bound out, for the same term, by the overseers of the poor.

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eral and punctilious interpretation of the language of the statute. The act does not say, that persons of colour, thereafter to be born, should not be deemed servants or slaves *for life*; but its language is, that they should not be deemed "*servants for life, or slaves*:" that is, as explained more definitely in the next section, they should be *qualified servants* for twenty eight years only, and should not be *slaves at all*; and that all "*slavery of children, (afterwards born,) in consequence of the slavery of their mothers, should be utterly taken away, extinguished, and forever abolished.*" If, as we do not doubt, it was the intention of the act of 1780, that no person should, after its promulgation, be *born a slave* in the State of Pennsylvania, the language of the act is appropriate and consistent. But, if such was not the legislative object, a delusive and inappropriate phraseology has been adopted.

If, however, the language of the third section of the act of 1780, could be so construed as to leave any doubt respecting the true legislative intent, all perplexity would vanish when the next section of the act is examined. That section shews clearly, that the children (of slaves) born after the date of the act, should, in consequence of their forlorn and helpless condition, be retained in a state of pupilage, until they should attain twenty eight years of age, and should, during that period, stand in the same relation to their superiors or masters, as that of *indented servants or apprentices*.

We cannot doubt, then, that Dinah Barrington was born free, and never was a slave; and that, as *she* was never a slave, her children must be free. Had they been born in Pennsylvania, they would certainly have been born free. The fact, that they were born in Kentucky, cannot *prejudice* their natural and legal rights; for *partus sequitur ventrem* is the law of this state; and we know of no law, human or divine, which stamps *slavery, a nativitate*, on children, whose mother was a *free woman* at the time of their birth. The only legal effect resulting from the fact, that the appellants were born in this state, is, that their birth-rights must be de-

Partus sequitur ventrem is the law of Ken. No one born here of a *free woman*, can ever be a slave. The birth right is determined by the *lex loci*.

A woman born of a slave, in Pa. since 70, though subject to apprenticeship till twenty eight years old, was born free.

terminated by the *lex loci*. Their mother having been a free woman at the time of their respective births, they, like all other children of free mothers, were, by the law of the place of their birth, born free, *absolutely, at once, and forever*.

The cases of *Frank ads. Milam's executors*, 1 *Bibb*, 615, and of *Any vs. Smith*, 1 *Littell*, 326, which have been relied on by the counsel of the appellees, have no application whatever to the point we are now considering.

In the first of those cases, the person, who sued for his freedom, was the child of a mother who was born a slave in Pennsylvania, prior to the year 1780, and was, *therefore*, a slave when she gave birth to the claimant; and this court decided, that *he* was a slave *because, at the time of his birth, his mother was a slave, and because he was born in Virginia or Kentucky, where, by law, the child followed the condition of the mother*. And, in the last of those cases, 1 *Littell*, 326, the party claiming to be free was born in Pennsylvania *prior to the year 1780, and was therefore a slave*.

It is true, that the court said, in the case of *Frank ads. Milam's executors*, *supra*, that, "by the provisions of the original act (that of 1780.) the children of slaves 'born within the state' (Pennsylvania,) after the passage thereof, were declared free after the age of twenty eight years; and if Sibley's children (of whom Frank was one) had been born within that state, the right of freedom would have been incipient, to be consummated by the attainment of the age specified." We do not, however, understand the court as meaning, by the foregoing language, that Frank, had he been born in Pennsylvania since 1780, would have been a slave; but only that he would have been liable to the prescribed *service* for twenty eight years; and, at the end of that term, would have been entitled to *freedom* from *such* servitude or control, just as an indented servant or apprentice would, at the end of the term for which he had been bound, be entitled to liberation from the government and discipline of his master.

But if the court could have intended to say, in the case of *Frank ads. Milam's executors*, that, on the hypo-

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And her children, tho' born in Ken. and within the period of the mother's apprenticeship, are unqualifiedly free.

The children born in Ken. of a bond mother, that was a slave in Penn. when their abolition act passed, in 780, and so not emancipated by that act—are slaves for life in Ken. 1 *Bibb*, 615.

A coloured person born in Pa. who, by the act abolishing slavery there, was subject to apprenticeship till 28 years old, may be held to the like service, for the same term, here: but is not a slave. 1 *Bibb*, 615.

Fall Term
1884.

Bennett et ux.
vs.
Dillingham.

thesis therein stated, Frank would, in any respect or for any purpose, have been a *slave* at his birth, or at any time thereafter, we should not regard such a declaration as, in any degree, authoritative: *first*, because it was altogether *obit*, and, *second*, because it would be, as we think, obviously irreconcilable with both the spirit and the letter of the act of 1780. No person, born in Pennsylvania since the year 1780, has ever been deemed to be a slave there, or elsewhere in America.

We are therefore of the opinion, that, upon the facts agreed, the appellants, and each of them, are, and ever have been, absolutely and in all respects, free persons of colour; and that, as such, they are, and have ever been, from their respective births, entitled to all the privileges and immunities to which that class of persons are entitled by the laws of this Commonwealth.

Wherefore, the judgment of the circuit court must be reversed, and the cause remanded, with instructions to render a judgment declaring the appellants and each of them to be free.

CHANCERY.

Bennett and Wife *against* Dillingham.

[Mr. Owsley and Mr. Breck for Plaintiffs: Mr. Turner for Defendant.]

FROM THE CIRCUIT COURT FOR MADISON COUNTY.

November 12.

Chief Justice ROBERTSON delivered the Opinion of the Court.

Statement of the
case.

DILLINGHAM, being the obligee in a replevin bond which had been given by Noland as principal, and by Bennett and others as his sureties, filed a bill in chancery against Bennett and wife, alleging, that they had removed to the State of Missouri; that all the obligors had become insolvent, and that Bennett, in right of his wife, held an interest in a tract of land, in the county in which the bill was filed, and was entitled to money in the hands of the personal representative of his wife's mother, and in the

hands of a commissioner who had, pursuant to a decree on the petition of Bennett and wife and others who were distributees of her mother, sold slaves to which the said distributees were, as such, entitled : and therefore praying for a decree, subjecting the said land and money to the satisfaction, *pro tanto*, of the replevin bond.

Bennett and wife answered the bill, and resisted a decree against them, on several grounds ; but particularly, because, as they alleged, the property, sought to be subjected, was still that of the wife, so far as to entitle her to a competent provision.

It was admitted, on the record, by Dillingham, that Bennett and wife have a large family of children ; that they are in a condition of extreme poverty and destitution ; and that the entire interest which they held in her mother's estate, does not exceed, in value, two hundred dollars.

The circuit court decreed, that fifty eight dollars, to which Bennett was, in the opinion of that court, entitled, out of the money in the hands of the commissioner who had sold the slaves, under the decree on the petition of the distributees, should be paid to Dillingham.

Waiving every other objection to the decree, we shall consider only whether Mrs. Bennett be entitled, in equity, to the whole, or any part, of the fifty eight dollars, in preference to her husband's creditor, who asks the chancellor to apply it to the payment of his debt.

It is the settled and peculiar doctrine of a court of equity, that a wife will be entitled to a provision, out of her own personal property, before the husband shall have actually obtained the possession of it ; and that the chancellor may secure a settlement on the wife, as against the claim of the husband, or his creditor, whenever either of them shall apply to him for his aid in getting possession of such property, claimed in right of the wife. In *Kenny vs. Udall*, 5 *Johnson's Chy. Rep.* 473, Chancellor Kent says, "It is now understood to be settled, that the wife's equity attaches upon her personal property, when

of the property, for the support of the wife, if she desires it, and her condition is such as to require it ; and if the whole is necessary for that object, no part will be put at the disposal of the husband, or within the reach of his creditors.

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Question for de-
cision here.

A court of equity will not aid a husband in reducing the chattels and choses in action of the wife to possession, nor subject them to the satisfaction of his debts (upon his creditor's bill against him and his wife, for that object)—without a suitable provision being made, out

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it is subject to the jurisdiction of the court, and is the object of the suit (in chancery,) in whosoever hands it may have come, or in whatever manner it may have been transferred;" and he cites numerous adjudged cases, in support of the principle thus laid down. How far this doctrine may, under all circumstances, be correct when applied to the *bona fide assignee* of the husband's legal right to the wife's chattles or choses in action, we shall not now decide, or stop to enquire; for we have no doubt that, in its application to the husband, or to his creditor, suing in equity, it is unexceptionable—whether the husband's interest in the wife's personalty be equitable or legal, in virtual possession or in action. Whenever the husband, or his creditor, calls on the chancellor for his aid, in getting hold of the wife's property, or property claimed in right of the wife, whatever may be the husband's interest in it, the chancellor may withhold any relief until the wife,—if she need and desire a provision—shall be provided for. 2 Pr. Wms. 639; 2 Ves. 669.

Property of the wife, which, under an order in the suit of a husband and wife, for distribution, has been converted into money in the hands of a commissioner, or administrator, is still not reduced to possession by the husband: were he to die, she alone would be entitled to it: it cannot be reached by his creditors, without a provision for her.

But, in this case, Bennett's interest in the distributable fund in the hands of the commissioner, had not been, and could not be deemed to have been, reduced into his possession. Before the decree for distribution, the wife's interest was a chose in action. *Whitaker vs. Whitaker*, 6 *Johnson's Reports*, 112. The wife was joined in the suit for distribution, and therefore the maxim *transit in rem judicatum* could not apply to such a decree, so as to change the wife's pre-existent right. The money in the hands of the commissioner is not in the possession of the husband; if he die before he receives it, and his wife survive, she alone will be entitled to it. *Manners vs. Martin*, 1 Ch. Ca 27; 1 *Vern.* 396; 2 *Ves.* 677; 3 *Atk.* 21; *Executors of Schoonmaker vs. Elmendorf*, 10 *Johnson's Reports*, 49.

The money in the hands of the commissioner is then no more liable, in this case, to the creditor's demand than the money in the hands of the administrator would be; and, as to each fund, we have no doubt that the chancellor should make no decree in favor of the creditor until Mrs. Bennett be provided for; and, as it appears, that the whole of both funds would be but a very

inadequate provision, the chancellor should not touch either of them, except in favor of the wife. See *Kenny vs. Udall*, *supra*.

Decree reversed, and cause remanded with instructions to dismiss the bill. It does not present a sufficient foundation for any decree as to the undescribed land, and the undefined interest of Bennett in it, even were we to concede that, otherwise, it would exhibit any equity which could, on the facts now appearing, be made available.

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Cardwell and Others *against* Strother and Howard.

CHANCERY.

[Mr. Owaley and Mr. Monroe for the Appellants: Mr. Crittenden and Messrs. Wickliffe and Wooley for the Appellees.]

FROM THE CIRCUIT COURT FOR SPENCER COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court—
Judge Nicholas not entirely concurring in the Opinion, and dissenting as to the mandate.

November 13.

GEORGE CARDWELL having sold and conveyed, it 1804. to George Strother, a tract of land in Gallatin county, and Strother having afterwards obtained a judgment against Cardwell's administrators for damages, in consequence of an eviction from the land, by a judgment in favor of John Howard, rendered since 1816, on an adversary title, the case was brought to this court and affirmed. *Litt. Sel. Ca.* 429.

Statement of the case.

Cardwell's administrators then enjoined the judgment, and prayed for a perpetuation of the injunction on two grounds: *first*, an alleged fraudulent combination between Strother and Howard, in the action of ejectment, which had terminated in the judgment of eviction; *second*, the asserted superiority of the entry under which Cardwell claimed.

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Without permitting Howard to answer the bill, the circuit court decreed a perpetuation of the injunction. This court reversed that decree, for want of parties, and remanded the case, for preparation, for a hearing on the entries, and as to the imputed fraud also, unless it had been tried in the action at law. See *2 J. J. Mar. 354*.

On the return of the case to the circuit court, Cardwell's heirs were made parties, for the purpose of obtaining a decree on the equitable right to the land; and Howard, according to the mandate from this court, was permitted to file an answer; in which he denied the alleged fraud, and required proof of the validity of the entry under which Cardwell claimed the land.

On the final hearing of the cause, thus prepared, the circuit court dissolved the injunction, with damages, and dismissed the bill with costs; and this appeal is prosecuted to reverse that decree.

We need not enquire whether the alleged collusion between Strother and Cardwell was investigated in the action of covenant, because we are of the opinion that the proof is insufficient to establish fraud.

But the question raised on the entry, is one of more difficulty.

No entry has been established by Howard. That relied on by the appellants, is an entry in the name of John Roberts, from whom Cardwell had derived title and which is as follows:—

“1782, *December 26th*.

John Roberts enters ten thousand acres upon a treasury warrant No. &c. beginning at the upper corner, next the river, of James Patton's entry of eight thousand four hundred acres, and to run parallel with the river six miles, then off, at right angles, eastwardly, for quantity.”

Patton's entry, which was surveyed September 20th, 1783, is as follows:—

“1782, *December 26th*.

James Patton enters eight thousand four hundred acres, on a treasury warrant, No. 1231, about two miles up the first branch above the eighteen mile creek, beginning at a tree marked J. P. and to run north, five

An entry—beginning at the upper corner, next the river, of J P's entry of 8400 acres, and to run parallel with the river, then off at right angles, eastwardly, for quantity”—the previous entry referred to, being—‘J P enters &c. about two miles up the first branch above the 18 mile creek, beginning at a tree marked J P, & to run north &c.’—is sufficiently definite, and good on its face. The notoriety of the stream at the date of the en-

miles, then to extend off at right angles eastwardly, for quantity."

The notoriety of "*eighteen mile creek*," at and prior to the date of Patton's entry, has been indisputably established; and the stream on which Patton's survey was made, and which has been called "*Patton's creek*" ever since the date of the entry, is the only one that could, with any propriety, have been denominated the first "*branch* above the eighteen mile creek;" and it appears, that the beginning corner of Patton's survey was a mulberry tree, two miles and about fifty poles, on a straight line, from the Ohio river, on the northern bank of "*Patton's creek*," near the margin of the stream, and exhibiting, in large and legible capitals, the initials, J. P.

On its *face*, the entry is, in our judgment, sufficiently definite in its calls, descriptive and locative, for any reasonable purpose of notice of its identity to a subsequent locator of prudence and vigilance.

"Though the tree, designated as the beginning, is not described by its kind or size or exact position, yet, we cannot seriously doubt, that a subsequent locator, after reading the entry, would infer, without hesitation or perplexity, that it was *on the branch*, about two miles from its mouth, and that it could therefore be found by ascending the branch a reasonable distance beyond two miles; and consequently, an honest and prudent locator, about to make a subsequent appropriation upon or near Patton's creek, would have searched for the tree marked J. P. and, had he done so in good faith, we are not allowed to doubt, that he would have found it without any difficulty, if it was, in fact, marked at the date of the entry, as described. Not only do the notoriety of "*eighteen mile creek*," and the character of the other calls authorize the presumption, that the beginning, if *marked as described*, could have been found, after proper enquiry and reasonable search, but the extraneous testimony proves clearly, that it *could have been*, and *had been*, *thus* found, shortly after the date of the entry. And that is as much of precision as this court has required in any entry.

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try, being established, and the proof justifying the conclusion that the tree was marked before the entry was made, is held to be valid.

A tree—the beginning corner—being described in an entry as marked with certain letters—the omission of further description, as the species, size or exact position, is not fatal. If the description will enable a subsequent locator to find the object, *by proper enquiry & search*, it is sufficient. Such a description of objects in an entry, as will enable a subsequent locator to go to the place and find them, by the mere directions of the entry, without any further assistance or enquiry, is not required.

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In the case of *Whitaker et al. vs. Hall*, 1 *Bibb*, 74, this court said: "It would be very unreasonable to expect and require, that a locator should so describe the objects called for, as that another, taking his words upon paper, could, by the help of *them alone*, without enquiry in *pais*, and as a *solitary wanderer*, find out and know, as soon as found, the objects intended." And, in the same case, page 75, the court said, that "no decision in this country has ever asserted, that an entry must necessarily contain such a reference to objects of notoriety and identity, as that a person could go from the office, with a copy of the entry, and, by that, find its position, unaided by any information from his fellows in society."

And hence, in the case of *Green et al. vs. Watson*, 1 *Bibb*, 105, this court established the validity of the following entry: Josiah Watson enters four thousand four hundred and fifty acres &c. lying on the north fork of Mill creek, a south-west branch of Hinkston's fork of Licking; beginning at a sugar tree and small white oak, marked *S. M.* standing in the fork of a branch near the head of said creek, and running north, &c. &c. The locative call in that case was scarcely as specific, or as easily susceptible of identification, as that contained in Patton's entry. Marked trees in the fork of a branch, NEAR the head of said creek." Should, *prima facie*, be presumed to be as difficult to find, and even more difficult to identify, than a marked tree on a designated creek, "about two miles" from its mouth; and more especially, when it is understood, as stated in the case just cited, that there were two "*prongs or forks*" to "Mill creek," neither of which was known, at the date of the entry, by any "*appropriate*" name. But, nevertheless, the entry was sustained in that case, because the court believed, from the proofs, that the beginning could have been found and identified, by a vigilant and enquiring locator.

Equally and even more strong, in some respects, are the proofs in this case. The only circumstances that could operate to the comparative disadvantage of Patton's entry, are: *first*, that the kind of tree is not stated; *second*, that its relative position to the branch or creek

is not, in so many words, expressly described. But, as before suggested, the entry clearly imports, that the tree was *on* the branch or near it; and whether the tree was a mulberry or a white oak, could not have been very material, because it was the letters upon it, and its relative position as described, which must have identified it, as the tree called for in the entry. But, in some other respects, Patton's entry is more descriptive, than *that of Watson*, which was sustained by this court. "The fork of a branch *near* the head of said creek," as called for in Watson's entry, is somewhat indefinite, and might be vexatious and delusive to a subsequent locator. No definite clue is given for ascertaining what branch was intended, or how "*near*" the beginning was to the "*head*" of the creek. But Patton's entry, with some degree of satisfactory approximation to certainty, gave the distance from the mouth of the "*branch*" to the tree marked *J. P.* and clearly imported, that the tree was on the bank of the branch, or so near to it as to be visible from it.

An entry made at a time when, as we may presume, there was no survey or other entry which it could have called for or adjoined, could not be expected to have been much more certain or specific than the calls of Patton's entry should be deemed to have been. There is nothing in the record from which we would be authorized to infer, that the entry could have been made to afford better *criteria* for identifying the place of beginning, except in the description of the tree called for as the beginning. But, as before suggested, the entry could not have been reasonably understood as meaning that the tree was any where else than on the branch, about two miles from its mouth. The tree was, in fact, *there*. And the proof satisfactorily shews, that, with those guides, a subsequent locator might have found and identified the tree, without difficulty, as early as the spring of the year succeeding the date of the entry.

We are, therefore, disposed to think, that, tested by reason, analogy, and authority, the entry should be deemed valid—if, as the appellants have tried to prove, the tree, described as the beginning, was marked with

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If a deposition is contradictory of any other previous deposition of the same witness, it destroys his credibility: but if the former deposition will admit of a construction not inconsistent with the latter, and the witness is supported by the testimony of others, his deposition will have its influence.

J. P. either before or at the time of the entry. As to this point there is no positive proof; and the circumstances, which have been established, are not such as will leave no room for doubt, or for difference of opinion.

Sanders, in his deposition, swears that Patton, started, in the fall of 1782, to explore the land up the branch since called Patton's creek; and, after his return from his tour of exploration, said that he had made such an entry as he did make; and also, that he (Sanders) went with Patton and others, to the place of beginning, in the spring of 1783, and saw the mulberry tree on the north side of the branch, with J. P. then marked upon it; and which letters exhibited the appearance of having been made some months prior to that time. McCarty swears to the same facts in substance; and also, swears, that he had seen the tree with the letters J. P. upon it, "in 1782."

It is true that McCarty, in a former deposition, in a suit between other parties, swore, that, prior to the survey, he had not seen any trees marked J. P. But, in a previous part of that deposition, he had virtually sworn, that the mulberry was marked prior to the survey, but that other trees were also marked J. P. at the time of the survey; and therefore, when, on cross examination, he said that *the trees* were marked at the time of the survey, and that he had seen J. P. on none of them before that time, he may have referred to the "*other trees*" that he had just described as having been marked when the survey was made; and it is not very improbable that such was his meaning—more especially, as Sanders, as well as himself, swore that *the mulberry* exhibited the letters J. P. in the spring before the making of the survey. But, however this may be, his character seems otherwise to be good and unimpeached, and what he swears in this case, is fortified by Sanders, whose veracity has not been questioned.

Proof that a locator went out, in the fall, to explore land, 20 miles or more from his resi-

Now, waiving what McCarty has sworn, as to his having seen the letters on the tree in 1782, we are still of the opinion, that the presumption, from the other facts which are established by sufficient proof, is, that

the tree was marked before the making of the entry in the office. It is not probable that, after the date of his entry, Patton would have gone from "*the falls of the Ohio*," upwards of twenty miles, in the winter time, to mark the tree. It is reasonable to infer that, when he explored the country in 1782, and determined to make his entry there, calling for a tree marked J. P. he cut those letters on the tree. And, from the testimony of Sanders and McCarty, fortified by that of Meriwether, the deduction is rational and strong, that the letters were made on the tree, as early as December, 1782. The fact, that the tree was not designated more specially, might tend to create some suspicion, that Patton had not been on the ground, when the entry was made in the surveyor's office. But that circumstance is, we think, repelled by the fact, that he went up the river in December, 1782, to explore the country, for the purpose of making an entry, and did make his entry immediately after his return. Then, the fact that the letters on the mulberry, were seen in the spring of 1783, apparently old enough to correspond with the call in the entry, should, in our judgment, be alone deemed sufficient to authorize the presumption, that the tree was marked prior to the date of the entry. In the case of *Green et al. vs. Watson (supra)*, there was no direct proof, that the trees called for as being marked with letters, had been so marked prior to the date of Watson's entry. But the court presumed, that the trees had been so marked; and said, "the presumption in its favor is strong, and ought to be indulged—because, had the locator intended, fraudulently to have made the marks after he made the entry, it is highly improbable that he would, in so short a time, have brought the surveyor to lay off the land; and still more improbable, that he would so particularly have called for two trees, a sugar tree and small white oak &c." Now it is evident that, without the designation of the kind of trees, the court would, in that case, have presumed, that the marks had been made prior to the date of the entry.

We conclude, therefore, that we should presume, from the facts proved, that the mulberry was marked before

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dence, and upon his return stated, that he had made a location upon land, which he immediately entered in the surveyor's office, with proof, that his initials, apparently cut months before, were seen the next spring, upon a tree at that place, authorizes the presumption that the tree was thus marked before he made the entry.

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The omission of a party to procure an order of survey, to show that a survey and patent are in conformity to the entry—there being no allegation of a want of conformity—is not fatal:—the court deciding in favor of the entry, might, *ex officio*, order a survey, to ascertain whether there was an interference, and to what extent. This ct., remanding the cause for further proceedings, directs that the survey shall be ordered.

the entry was made—and therefore the entry is deemed valid.

During the progress of the case, no survey was made in the circuit court. We cannot, therefore, decide whether, or how far, the original survey and the patent correspond with the entry. But there is no intimation in the answers, that the survey was not made conformably with the entry; and we think, that, had the circuit court, deemed the entry valid, that court should, *ex officio*, have directed a survey to be made, so as to ascertain the actual position of the original survey, and whether it includes, so far as it was made, according to entry, the land now in contest. As the calls in the patent, seem *prima facie* to correspond with the entry, and as there is enough in the record of the action of ejectment, (which seems to have been read as evidence in this case without objection.) to induce a presumption, that the survey, as made, includes the land in contest, or some of it; and, as we should presume, that the patent corresponds with the survey, we do not deem the omission to make a survey, whilst the case was in the court below, fatal to the equity asserted by the appellants; and are of the opinion, that, as the entry is now adjudged to be valid, a survey should yet be made on the return of this cause to the circuit court, for the purpose of ascertaining, with a more satisfactory certainty and precision, whether, and to what extent, the original survey, so far as it was conformable with the entry, includes the land in controversy. See *Hancock vs. Hancock*, 1 Mon. 122.

Wherefore, it is decreed by this court, that the decree of the circuit court be, and the same is hereby reversed, and the cause remanded for further proceedings and decree, pursuant to this opinion and to the former opinion of this court.

Judge Nicholas does not altogether concur in this opinion, and dissents from the conclusion and mandate.

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Gill's Will.

[Mr. Anderson for the will : Mr. Crittenden contra.]

FROM THE GARRARD COUNTY COURT.

Judge UNDERWOOD delivered the Opinion of the Court in this *November 18.* case—in the decision of which, the Chief Justice took no part.

IN June, 1833, it is said, Doctor William Gill made a nuncupative will, by which he bequeathed a considerable personal estate to his relations. John Aldridge was one of the legatees. The bequest to him was large, and he died a few days after Doctor Gill. Two of the children of Aldridge, at whose house Gill died, are the only witnesses introduced in support of Gill's will; and they are, under the will of their father, interested in establishing the nuncupative will; which was offered for proof—having been reduced to writing, within less than six months after the testamentary words are alleged to have been spoken, and admitted to record by the Garrard county court.

A nuncupative will—witnesses competent at the time the will was made, but interested when it was offered for record—question upon the admissibility of their testimony.

The competency of the witnesses to depose, is the only question worthy of consideration; for if their testimony can be received, there is no doubt that the county court properly established the will.

It is contended, that the witnesses were competent at the time they were called on to take notice of the testamentary words, and that a subsequent interest cast on them by operation of law, as heirs to their father, or a voluntary acceptance of the provisions of his will, in their favor, cannot deprive the other legatees of Doctor Gill of the benefit of their testimony.

Or, if that position be untenable, it is insisted, that a liberal construction of the ninth section of the act of assembly, relative to wills, would embrace witnesses, whose testimony may be necessary to establish a nuncupative will, so as to allow and compel them to testify, although the result might be to deprive them of all ben-

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est which might flow from the establishment of the will they were called on to sustain.

The first ground assumed divides itself into two inquiries: *first*, do we know that the witnesses were competent at the time they heard any testamentary words from Doctor Gill? and, *second*, if they were competent at any such time, will their subsisting interest when required to testify, make it the duty of the court to exclude them?

An interested witness is not competent to prove that he had no interest when the facts to be established by him occurred. If he was then disinterested, but became interested afterwards by his own voluntary act, or the act of another, and is therefore not incompetent, it must be made to appear by testimony other than his own:

As to the first point, it may be remarked, that all our knowledge is derived from the witnesses, who fix the period when the testamentary words were spoken, and detail the facts which show that they had no interest at that time. Now if it be conceded, as contended, that a witness once competent must continue so, notwithstanding an interest subsequently acquired by his own voluntary act, or cast on him by the act of another; still it would be a question of consequence, whether his original competency should not be made to appear by other evidence than his own testimony; for if other evidence be not required, it might, in numerous cases, if not in all, be within the power of an interested witness to date transactions in such manner as to let in his testimony, and thereby to promote his interest by perjury. The ground of objection to an interested witness is, that he cannot be trusted in consequence of his interest; there is danger that he may be influenced by it to commit perjury; and hence the general rule, that he shall not testify in a case which concerns himself. It would afford great facilities and temptations to fraud and perjury, were we to allow an interested witness to make out the existence of his competency at a former period, and thereby to legitimate his testimony on the trial. Such an exception would enable a distributee to testify in behalf of the administrator, whenever the distributee was willing to swear that his knowledge of the facts was obtained before the death of the intestate. We are not acquainted with any adjudged case which sanctions such a principle, and think there is no good reason for it. We are therefore of opinion, that the witnesses in the present case could not legally establish their competency

to testify at a former period, so as to present themselves in an attitude in which others might rightfully claim the benefit of their testimony, notwithstanding their interest at the moment of testifying.

But if we grant, that the witnesses could, in this case, show, that there was a time when they would have been competent to prove the due publication of the nuncupative will, still we think their interest at the time they were called to testify, was such, as to make it the duty of the court to exclude them. In principle their case is like that of the distributee called to testify in behalf of the administrator or executor. By establishing the will of Doctor Gill, their father's personal representative would be entitled to the legacy to him of about three thousand dollars, and this sum, so acquired, would enlarge their distributive shares. It was a difference of opinion between Lords Camden and Mansfield, whether a witness who was incompetent at the time of attesting a will, to which the British statute required three "credible," construed to mean competent, witnesses, could, by the subsequent removal of his disability, thereby become competent to testify; but we have nowhere found it determined, that a witness competent at the time of attestation, could give evidence on the trial, in support of his own interest subsequently acquired. If there are others connected with the witness in interest, it may be their misfortune to be deprived of his testimony, but such must be the result, unless they can bring the witness within some established exception to the general rule. The exception applicable here, if there be any, is laid down by Starkie, part IV, page 750, in these words: "A witness cannot, by the subsequent voluntary creation of an interest, without the concurrence or assent of the party, deprive him of the benefit of his testimony in any proceeding, whether civil or criminal. For the party had a legal interest in the testimony, of which he ought not to be deprived by the mere wanton act of the witness" This exception does not embrace the case. The witnesses here have committed no wanton act prejudicial to any one. They

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A nuncupative will cannot be proved by one who, when called as a witness, is interested in its being established—the' he did not acquire his interest till after the will was published. — If one who is entitled to a legacy under a will, dies, his heirs or devisees, whose portions will be enlarged by establishing it, are not competent to prove it—notwithstanding he whose will they are to prove died first, & they, at the time it was made, were disinterested.

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have not been actors to change their condition. They did not create their interest : on the contrary, their interest has been created by the act of Aldridge, their father ; who by his will has provided for the witnesses. If Aldridge had died intestate, the interest of the witnesses would have been created by operation of law. In either case, their interest is not the consequence of their acts. Suppose, instead of making the witnesses interested by his will, Aldridge was yet alive, and had transferred to them by gift, and for valuable consideration, the legacy left him by Gill ; in such a state of things, it could not be contended, with any plausibility, that the witnesses could by their testimony establish the will. We do not see how the death of Aldridge alters the case. If he was alive, he could not prove the will for his benefit. He cannot cast his interest by his death upon his children, either as distributees, or legatees, without throwing upon them likewise his disability to testify. A part of Aldridge's children cannot, after his death, use the others as witnesses, to establish a right derived from the father, any more than they could were the father living and had assigned his interest jointly to the children, for a valuable consideration.

A bequest to a subscribing witness to a will, that cannot be proved without him, is void ; and if he is entitled to a portion in case the will is rejected, so much of the portion as does not exceed the value of the bequest, is saved to him. *Act of 97, §9.* Query—can this act be so construed as to embrace the witnesses to nuncupative wills? It does not apply to those who have no bequest in

It remains to enquire how far the ninth section of the act relative to wills, can operate upon this case. By that section the subscribing witness to a will, in which there is a legacy to him, may be compelled to prove the will, if it cannot be otherwise proved ; and in that event, his legacy is taken away ; but any interest which he might have had as heir or distributee, is saved to him, provided it does not exceed the value of the bequest or devise which he loses. We are of opinion that this section has no application to the present case. Had the witnesses been provided for by the nuncupative will which they are called on to prove, then the question might have been presented, how far witnesses to prove nuncupative wills could be embraced by the statutory rule applicable to the subscribing witnesses of written wills. But the witnesses here take nothing by the nuncupative will. Their interest is derived under the will

of Aldridge. Now we perceive no mode of vacating the devise made by Aldridge to the witnesses. The interest which they acquire by his will, may greatly exceed that which they would be entitled to as heirs and distributees; and if so, we find no authority in the statute to make them surrender a greater interest, and take a lesser one, so that they may be rendered competent to prove the will of a third person. All that the spirit of the statute could require, is that, the witnesses in this case should surrender all the interest which they have, under the will of their father, in the three thousand dollars bequeathed him by Doctor Gill, and then to let them in to share such portion of Doctor Gill's estate as they might be entitled to, as part of the distributees of Gill, had he died intestate, and after the death of Aldridge and his wife. We cannot carry out the supposed analogy between the subscribing witnesses of a written will, and the witnesses in the present case, through such an unexplored labyrinth as that into which we should be led. Hence we conclude that the ninth section of the statute of wills has no bearing on this case.

The judgment of the Garrard county court admitting the paper purporting to be the nuncupative will of William Gill, deceased, to record is reversed and set aside; and for want of competent proof the contents of the said paper written by S. H. Anderson, in the presence and under the statements of Maria Tillett, one of the witnesses, are hereby rejected, and declared not to be the nuncupative will of the said Gill.

The plaintiffs in error must recover their costs.

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the will they are called to prove, but which they are otherwise interested in establishing.

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CHANCERY. *Cates and Others against Woodson.*

[Mr. Crittenden and Messrs. Morehead and Brown for Appellants: Mr. Monroe for the Appellees.]

FROM THE CIRCUIT COURT FOR CHRISTIAN COUNTY.

November 14. Chief Justice ROBERTSON delivered the Opinion of the Court.

Statement of the case. In 1797, Joseph Crocket, then owning a military survey for one thousand acres of land, assigned *all his interest* therein to Tucker M. Woodson, to whom a patent was afterwards (1799) issued, for the entire tract, and who, after the emanation of the patent, and in the same year, sold and conveyed to Gholson Stapp, seven hundred and fifty acres, without designation of boundary otherwise than by the stipulation, that the quantity thus sold should lie within the patent bounds.

In 1816, the heirs of Gholson Stapp conveyed to Joshua Cates, all their interest (derived by descent from their ancestor,) in the undivided quantity of seven hundred and fifty acres, which had been conveyed by Woodson.

In 1814, Tucker M. Woodson was, by a regular inquisition, found to be then a lunatic, and Samuel H. Woodson was appointed his committee; and, in 1817, the court, having ascertained by another inquest, that Tucker M. Woodson was still a lunatic, and that Samuel H. Woodson was unwilling to continue to be his committee, appointed (in June,) Joseph Crocket the committee of his person and estate.

In April, 1817, Cates filed a bill in chancery against Joseph Crocket, Tucker M. Woodson and Moses Shelby, alleging, that Crocket had employed Shelby to survey his military claim of one thousand acres, and had agreed to allow him one fourth part of the land; that Shelby, having made the survey and thereby become entitled to the one fourth, sold his interest to Crocket, in December, 1814; and that Crocket had sold it to Cates, on the first of January, 1817; and, therefore,

praying for a conveyance of the legal title from Woodson, to the one fourth—that being supposed to be the residue of the tract after deducting seven hundred and fifty acres, which had been conveyed to Stapp.

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There was no service of process on either Crocket, Woodson or Shelby, and the latter did not enter an appearance. But, at the October term, 1817, Joseph Crocket filed his answer, and Robert Crocket, who had been appointed, at the April term, guardian, to answer for Woodson, also filed an answer. And thereupon, at the same time, the court decreed that Cates was entitled to a conveyance of the legal title "to one fourth part of said survey of one thousand acres—being the balance, after deducting the seven hundred and fifty acres conveyed by Woodson to Gholson Stapp;" and a commissioner, appointed for that purpose, made a deed according to the decree, which deed the court approved.

In March, 1821, Tucker M. Woodson, then being deemed to be of sound mind, was, by order of court, discharged from the control of his committee, and restored to the rights and privileges of a sane man, *sui juris*.

In 1819, William Hunter filed a bill in chancery against T. H. Letcher and others, alleging, that Letcher had bought from Woodson, and sold to him (Hunter,) Woodson's interest in the one thousand acres; that Cates asserted a claim to the whole tract; and therefore praying for a decree for a good title, or for a rescission of the contract with Letcher. Cates and Woodson, who had been made defendants, both answered the bill. The former asserted a claim to the entire tract; and the latter made his answer a cross bill against Letcher, and prayed for a rescission of *their* contract. Letcher was never made a party to the original bill, or to the cross bill, and did not answer either of them. But, in 1821, the court decreed a rescission of the contract between Hunter and Letcher, and a cancelment of any deed, or other written evidence of the agreement between Woodson and Letcher: and dismissed the bill as to Cates.

In 1823, Tucker M. Woodson conveyed to his son Joseph M. Woodson, all his right to the one thousand

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acres. And, in 1829, Joseph M. Woodson filed a bill in chancery against Cates and others holding under him, alleging, among other things, that there is a surplus of about six hundred and fifty acres in the tract; and praying for a partition, assigning to Cates and his vendees, seven hundred and fifty acres, and to himself (Joseph M. Woodson,) the residue. The right to any relief was resisted by the answers. But the circuit court rendered a decree for partition, according to the prayer in the bill; and this appeal is brought to reverse that decree.

The appellants rely on several grounds, in opposition to the decree. *First:* the record in the case of Hunter against Letcher and others. *Second:* the decree in the case of Cates against Crocket and others. *Third:* they insist, that a part of the land lies between Walker's line and the chartered boundary line between this state and Tennessee, and that the circuit court had no jurisdiction over so much of the tract as lies south of Walker's line, which is the conventional boundary between the two states. *Fourth:* they say, that there is a defect of proper parties. And, in consequence of all these objections, they insist, that the appellee was not entitled to any decree; but that, if he was, the decree rendered, is for more than he was entitled to in equity.

The points thus presented, will be briefly considered, in the order in which they have been stated.

I. There is nothing in the record in the case of Hunter against Letcher and others, which can materially affect the right asserted by the appellee. There was no decree or litigation in that case, as between Tucker M. Woodson and Cates. But the counsel for the appellants has argued, that the record shews that Tucker M. Woodson had, whilst a lunatic, conveyed all his interest in the one thousand acre tract, to Letcher; and that, therefore, as the deed of a lunatic is not void, but voidable merely, the title must be deemed to have been in Letcher, and not in Tucker M. Woodson, when the latter made the deed to the appellee; and that, consequently, the appellee has established no right to any decree against the appellants.

To this argument, a two-fold answer may be given:—

A lunatic makes a deed, and afterwards, when sane, conveys the same land to another grantee—tho' the first deed is not absolutely void, the subsequent grantee, because of the privity of contract between him and the lunatic, may avoid it.

A decree cancelling a sale made by a lunatic, in a suit in which his vendee was not

first, the record does not shew that Tucker M. Woodson had ever made a deed to Letcher. *Second*, the deed, had one been made, might be avoided by the appellee, in consequence of the privity of contract between the lunatic and himself; and, in this aspect of the case, the only effect of the record in *Hunter vs. Letcher and others*, would be to shew that Letcher might have been a proper party to this suit; because, not having been made a party in the case of *Hunter and others*, the decree in that case did not affect any interest which he may have held.

II. As Shelby was not, by regular service or by appearance, made a party in the suit of Cates against Crocket and others, the decree rendered in that case, had no effect on any pre-existent equitable right to which he may have been entitled. But nevertheless, though it might be reversable on that ground, still it may be effectual as to Tucker M. Woodson and Crocket, until reversed; and may, therefore, be sufficient to vest in Cates the legal title of Woodson. And, unless it should be deemed to be void, it has that effect. But, we cannot decide that it is void.

As to the proper mode of litigating in respect to the property of a lunatic in the custody of a committee, there is some diversity in the books, and there has been, also, some oscillation in the practice of courts. Mitford says, that both the committee and the lunatic should be served with notice. *Mitford's Pleadings*, 29, 94. But, in the case of *the Executors of Brashears vs. Vancourtland*, 2 *Johnson's Chancery Reports*, 242, Chancellor Kent decided, that actual service on the lunatic was, not only an unnecessary, but an idle act; and said that, "it would be quite absurd to bring in a party who has no capacity or power of action, except by the very persons already before the court, as his trustees." We are disposed to adopt, as the more reasonable practice, that recognised by the chancellor of New York.

Now, whether service on the lunatic was proper or not, we are of the opinion, that, as Joseph Crocket, the

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before the court,
does not bind
the latter.

A decree against several defendants, will not affect the rights of one who was not before the court, and is erroneous as to all; yet, until reversed, it is operative on those defendants who were regularly before the court.

Upon a bill against a lunatic in custody of a committee, service of process, upon the committee is sufficient; it is not proper to subpoena the lunatic himself. If the committee is a co-defendant, and before the court in his own right, he has sufficient notice to defend for the lunatic. Where the committee is personally interested in the suit, the appointment of a guardian *ad litem* for the lunatic.

natic, is proper. [The decree was for land, the legal title to which was in Judge Underwood thinks the decree as to him, was void—*post*.]

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committee, was before the court, in his own right, and thus had, in fact, notice of the claim asserted against the lunatic, as well as of that asserted against himself individually; and, as the chancellor, in consequence of the personal interest of the committee, very properly appointed a guardian *ad litem*, or committee for the occasion, who answered the bill, and represented the lunatic, we will not presume that, *that* answer was altogether without authority, nor that the lunatic was totally unrepresented in the suit. And, though the decree as to him, may have been improvident, or even erroneous, we cannot decide that it is *void*.

It is not, therefore, material whether Crocket's assignment of his "interest" transferred to Tucker M. Woodson the entire survey, or only three fourths thereof, nor is it material, as this case now stands, whether, even if Woodson supposed that he had obtained from Crocket the equitable right to the whole survey, he had notice of the alleged equity of Shelby.

The owner of a tract of land, patented as 1000 acres, sells 750 undivided; the vendee acquires the interest of a locator, and under that claim, obtains a decree and conveyance for "a fourth of the land—being the balance after deducting the 750 acres;" it turns out, that there are 1650 acres in the tract: the vendee is entitled to his 750 acres, by his purchase, and by his decree, to one fourth of the whole tract only, (the words "being the balance" &c. obviously inserted through misconception of the true quantity, being inoperative;) the residue of the tract. (surplus) remains to the patentee, or his assigns.

But, the decree in the case of Cates against Crocket &c. did not transfer the title to the whole residue of the tract, after deducting the seven hundred and fifty acres which had been conveyed to Stapp, if, as alleged and not controverted, the patent boundary contain more than one thousand acres.

Only one fourth of the tract was claimed for Shelby. The tract was described and understood to be one of one thousand acres only; and hence, the decree and the conveyance, pursuant thereto, for "*one fourth part, being the balance*" after deducting the seven hundred and fifty acres previously conveyed to Stapp, should be understood to mean two hundred and fifty acres, or one fourth of the supposed quantity of one thousand acres. Wherefore, if, as alleged, the patent boundary contain one thousand six hundred and fifty, instead of one thousand acres, Cates is not entitled, under that decree, to nine hundred acres, which would be the residue after deducting Stapp's seven hundred and fifty acres; but

is entitled to only one fourth of the entire tract of one thousand six hundred and fifty acres, that is to four hundred and twelve and a half acres; and consequently, the decree notwithstanding, the appellee Woodson seems to be entitled to all the residue of the entire tract, after deducting Stapp's seven hundred and fifty acres, and also four hundred and twelve and a half acres, or one fourth of the actual quantity included within the patent boundary.

III The patent was issued by this Commonwealth, and the land is described as lying in the (now) county of Christian in this state. By the convention of 1820, between the states of Kentucky and Tennessee, "Walker's line," east of the Tennessee river, was established as the boundary, so far, between the two states. It is now suggested, that a small portion of the land embraced by the patent, lies between "Walker's line," and the chartered latitudinal line of 36 deg. 30 m. and, of course, within the conventional jurisdiction of the state of Tennessee; and, to that extent, the counsel for the appellants have argued, that the circuit court in Kentucky had no jurisdiction in this case.

The fact assumed as the basis of the argument, has not been established. An amended answer, in the nature of a cross bill, suggests indefinitely, that a *small portion* of the tract is south of Walker's line. The answer to that vague allegation, does not admit its truth, but rather imports, that the respondent did not know certainly whether or not any part of the land is within the jurisdictional limits of Tennessee; and there is no proof, by survey or otherwise, shewing that Walker's line touches the land.

Had the fact, thus alleged and urged in argument, been established, an interesting question of jurisdiction involving the comity of co-states, and perhaps the true construction of the compact of 1820, establishing Walker's line as the boundary between them, would have been presented in a novel and perhaps unexampled form. But, even if the alleged fact had been satisfactorily established, and even also, were we to concede that, although the title is derived from Kentucky—the

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The allegation, that part of the land lies within the conventional limits of Ten. not being admitted, or proved, the question of jurisdiction &c which might arise, under the peculiar circumstances of the case, are merely suggested—not decided. A court in Ken. could not partition the land in Ten. but would probably allot to the comp't his share out of the land within this state, unless the parties could agree upon a division.

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larger portion of the tract is in Kentucky, the parties are in this state, and the proper court of this state first got possession of the case, for the purpose of making partition of an entirety—yet *that* court had no jurisdiction to enforce a partition of so much of the tract as lies south of Walker's line, still we should have been inclined to the opinion, that, as the complainant in the circuit court might have the whole of his interest allotted to him in this state, the chancellor might, on his electing to take the whole of it here, have decreed accordingly, and have left the residue of the tract for Cates and his vendees, unless they had consented to a *voluntary* partition, by the parties themselves, of the entire tract. But the *established* facts of the case do not require or allow an express decision on any of the questions which the *alleged* fact might have presented for consideration.

In a suit to establish the complainant's right, and have partition of land, one to whom the comp't's vendor had, while a lunatic, sold the same land, is not a necessary party: see page 453; nor is a locator, whose interest a def't held under a decree and commissioner's deed—see p. 452.

The purchaser of part of a tract of land, with out designation of his boundary, cannot take choice of the part he will have, upon partition. *Improvements* should be regarded in making the allotments.

IV. It is the opinion of a majority of the court, that it was not necessary for Woodson to have made either Shelby or Letcher a party to his suit.

The consequence of the foregoing view of the case, is, that the decree of the circuit court must be reversed.

On the return of the case to the circuit court, a decree should be rendered, for partition of the entire tract, according to the foregoing opinion.

In that partition, Cates will not have, as his counsel seemed to suppose he would, any right, as a matter of course, to have the seven hundred and fifty acres, which he purchased from Stapp, laid off to him in the *northern* portion of the tract. The sale to Stapp was of seven hundred and fifty acres of the whole tract, without any other designation of locality.

But the circuit court, in its partition, should, as far as may be consistent with equal justice, regard and protect settlements and improvements made on the land in good faith.

Decree reversed, and cause remanded for a decree conformable with this opinion.

Judge Underwood is of the opinion, that the decree in the case of Cates against Woodson and others is void; and, therefore, he dissents from so much of the foregoing opinion, as decides that *that* decree is not void.

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McMeekin vs. Johnson and Beatty.

Attachment.

[Mr. Lyle for Plaintiff: Messrs. Morehead and Brown for Defendants.]

FROM THE CIRCUIT COURT FOR SCOTT COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

November 13.

THIS writ, of error is prosecuted to reverse a judgment of the Scott circuit court, for one hundred and forty four dollars and fifty cents, rendered upon an attachment, which was issued against the plaintiff in error, as an absconding debtor, by a justice of the peace of Scott county, directed to the sheriff or any constable of Franklin, and which was levied and returned by a constable of Franklin.

Attachments against absconding debtors can be issued only in the county where the debt resides; but may be sent to any other county, & executed by any sheriff or constable.

It is objected, first, that the attachment could not lawfully go to any county but that from which it issued; second, that the return should have been made by the sheriff, not by a constable.

A constable may execute an attachment for a debt above £5; but having done so, he must deliver the process and property, to the sheriff of his county, who is to proceed with it, as tho' he had levied it himself. A return by the constable will not authorize judgment upon it: the attachment will be dismissed.

The first objection cannot prevail. A fair construction of the act of 1796 will allow the attachment to be sent to any county in the state. The fifth section says, attachments for sums of five pounds and over, shall be directed to the sheriff, who may levy the same on the slaves, goods and chattels of the party absconding, "*wherever the same shall be found,*" without any words expressly restricting it to the sheriff of the county, or to property in the county. The ninth section, on the contrary, in cases under five pounds, says, the attachment shall be directed, "*to the sheriff or any constable of his (the justice's) county.*" The difference in the mode of expression, leaves room for the inference of a difference of intention. It has been determined, that the statute only authorizes the issuing an attachment by a justice of the county of which the defendant was last an inhabitant. If the construction now contended for, were allowed, the absconding debtor's property would become wholly ex-

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empt from attachment, so soon as he got it across the county line. This the legislature could not have intended. Besides, the subsequent act of 1804 was passed for the express purpose of authorizing attachments to be sent out of the county, for sums under five pounds; and as there is no reason for not extending the same privilege to sums above five pounds, the presumption is, it was not so extended by this latter act, because the legislature thought there was no necessity for it—the prior act having allowed it to be done.

The second objection is well taken. For though the act of 1803 allows a constable to levy an attachment, for a sum over five pounds, yet, it directs him immediately to deliver it over, together with the property attached, to the sheriff of his county, “whose duty it shall be to act with the same, in every respect, as if it had been attached by himself.” One of these duties is to return the attachment to the circuit court, with his official return of the service of the attachment. It was upon his return alone, that we presume the legislature intended the circuit court should act.

Judgment reversed, with costs, and cause remanded with directions to dismiss the attachment.

COVENANT.

Pleasant and Robert Blakey, for the use of Pleasant Blakey vs. Thomas Blakey and James Gilmour.

[Messrs. Morehead and Brown for Appellants: Mr. Crittenden for Appellees.]

FROM THE CIRCUIT COURT FOR CHRISTIAN COUNTY.

November 14. JUDGE UNDERWOOD, delivered the Opinion of the Court.

Statement of the facts, and pleadings.

PLEASANT AND ROBERT BLAKEY, having instituted a suit in chancery against Thomas Blakey, obtained a restraining order, enjoining the removal without the jurisdic-

tion of the court, of certain slaves in the bill mentioned, and requiring the execution of bond, with security, to have them forthcoming, to abide the decree.

Thomas Blakey gave the bond, as required. In the body of the bond, Thomas Blakey and John Clark are named as the obligors, but there is no mention of Gilmour. At the foot of the bond, however, there are three seals, and the name of Gilmour is set opposite the last, as an obligor.

This is an action of covenant, founded on the bond thus executed, instituted in the names of Pleasant and Robert Blakey, for the use of Pleasant, against Thomas Blakey and Gilmour, as surviving obligors.

The defendants filed various pleas. The cause went off upon demurrers to replications, filed to the first, third and fifth pleas.

The first and third pleas, in substance, rely upon a release executed on the 22nd March, 1832, by Robert Blakey, releasing the defendants from liability on their bond.

The fifth plea, as matter of defence, avers that Robert Blakey dismissed the chancery suit in the declaration mentioned, and had obtained no decree for any part of the slaves, or their value; and that one third of the value of said slaves was, in said suit, decreed to Thomas Blakey.

The replications filed to the first and third pleas, attempt to avoid the effect of the release, by averring, in substance, that Robert Blakey, before the execution of the release, to wit, on the 7th of April, 1825, by a written instrument, transferred all his interest to William Davenport; that the suit progressed, and the court rendered a decree in favor of said Davenport, for said Robert's interest—which decree is proffered to the court; and that said Robert, at the time of making the release, was suing for the use of said Davenport—consequently, had no right to make the release, and therefore the same was fraudulent and void. The replica-

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A bond is executed, the object and condition of which, are, to secure the respective rights of the several obligees, as they shall be ascertained by a chancery suit—as the forthcoming of slaves in which each one claims an interest: it is not competent for one of the obligees to make a release which

shall affect the rights of the others; and the release of one, who had no interest, or had transferred his interest, so that nothing was awarded to him by the decree, is void. A plea, to an action on the bond, setting up a release by such obligee, is a departure, and the issue, whether of law or fact, immaterial.

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tion to the fifth plea avers, that, before Robert Blakey dismissed the chancery suit, he transferred all his interest amounting to one third of the slaves, to William Davenport, by a written instrument; that the suit in chancery continued, in the name of Pleasant Blakey, for the use of said Pleasant and said Davenport, and that a decree was rendered in their favor, severally, for two thirds of the slaves.

We are of opinion, that the whole of said pleas and replications are irrelevant, and a departure from the true cause of action as set out in the declaration. The issues formed thereon, whether of law, or fact, were immaterial.

The condition of the bond is, to hold the slaves, "subject to any order or decree of the court, and within reach of its process." The decree was rendered in October, 1828, directing the sale of the slaves, and an equal division of the proceeds between Pleasant Blakey, Thomas Blakey, and William Davenport. The nature and extent of the liability of the obligors depended upon the character of the decree which might be rendered in the suit to which the bond referred. The object of the bond, when taken, was to secure the rights of both obligees, as they might be settled by the decree, and to the extent of the property on which the restraining order was made to operate. If, by the decree it appears, that either obligee has no interest, then such obligee has nothing to release of any substantial benefit, and no release which he may attempt to execute, should be allowed to operate against the clear rights of the other obligee, who has a valuable interest at stake. The bond binds the obligors to take notice of the decree which shall be rendered, and the declaration sets out the decree, which shows on its face, that Robert Blakey had no right to any part of the slaves. The action was brought for the sole use of Pleasant Blakey, and so stated in the writ and declaration. The pleas, therefore, which set up a release from Robert Blakey, were no defence to the action in favor of Pleasant. Indeed, it appears, that the process was executed on the defendants, before the pretended release was given by Robert Bla-

key. The case is very different from that of one of two joint obligees undertaking to release a debt or duty actually due to both.

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The fifth plea was no answer to the declaration. If no such decree had been rendered as that set out in the declaration, issue should have been taken, by denying the averment. If Robert Blakey had dismissed the suit so far as he was concerned, that circumstance could not operate against Pleasant Blakey. The plea itself shows, here was not a total dismissal of the suit, leaving the merits of the controversy undecided.

The court, therefore, upon the demurrers, should have given judgment against the pleas; for the matter set up by them, constituted no good defence to the action as made out in behalf of Pleasant Blakey, who is in substance the sole plaintiff.

But it is objected, that the bond on which the action is founded, is not binding on the defendant Gilmour, because he is not mentioned in the body of it, but is excluded as a party, by the maxim *expressio unius est exclusio alterius*. The case of *Bruce vs. Colgan*, 2 *Litt. Rep.* 287, is an authority in point, and shows that a person who subscribes the instrument, is bound, although his name is not inserted with other obligors in the body of it.

It is further objected that the declaration is bad, because Pleasant and Robert Blakey were improperly joined as plaintiffs; and therefore it is insisted, that, as the whole of the pleadings are before the court upon the demurrer, judgment should have been given against the declaration.

This objection is well taken. In *Thomas vs. Pyke*, 4 *Bibb*, 420, it is said to be "well settled, that although a man may covenant with two or more jointly, yet, if the interest and cause of action be several, the covenant shall be taken to be several, though the words of the covenant be joint." 1 *Saund.* 154, note 1, is referred to. Take the bond in connection with the decree, and it will appear, that the obligors are liable to the obligees severally, and not jointly. The declaration shows, that the obligors were liable to Pleasant Blakey alone, for

Action upon a bond to several, conditioned that certain property, involved in a suit in chancery, shall be produced, to abide the decree: plea that one of the obligees dismissed the suit, so far as he was concerned, and obtained no decree, is bad. If there is no such decree as the declaration avers, issue should be taken on the averment. A writing obligatory binds all who sign it, as obligors — as well those not named in the body, as those who are.

Where the interest and cause of action, of two or more joint covenantees, is several and not joint, each may maintain his separate action on the covenant; — and if the several covenantees join in an action to enforce the separate right of one, the misjoinder is fatal, and the declaration bad on demurrer.

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running off the negroes, whereby, he was deprived of that portion of the money decreed him, which would have been raised by the sale of the slaves, had they remained subject to the decree. There is no propriety in making Robert Blakey a joint plaintiff, in order to recover this money. Cases may readily be imagined, where there would be a striking impropriety in uniting all the obligees as joint plaintiffs. For instance, suppose a dozen complainants, and a decree against a single defendant, that he pay A so much, B so much, and so on, directing specific sums to be severally paid to each complainant—from which decree the defendant appeals, and executes an appeal bond to all the complainants jointly. If the decree is affirmed, each appellee should have his separate action for the sum due him. Were they compelled to unite in a joint action, and joint recovery, it would put the rights of A at the disposal of B, who might receive all the money and leave A remediless.

Wherefore, on account of the defect of the declaration, the judgment is affirmed with costs. This suit will not bar other proceedings, by action in the name of Pleasant Blakey alone.

COVENANT.

Combs vs. Tarlton's Administrators.

[Mr. Monroe for Plaintiff: Mr. Haggis and Mr. Crittenden for Defendants.]

FROM THE CIRCUIT COURT FOR FRANKLIN COUNTY.

November 14. Judge UNDERWOOD delivered the Opinion of the Court in this case, on the 26th of April last: upon which a petition for a rehearing was presented, which is now overruled.

Statement of the
facts.

COMBS bound himself to convey fifty two acres of land to Tarlton, upon the determination of a suit then pending between Martin Nall and Samuel Johnson. The title was in Nall. Combs claimed under a contract with

Walker, who claimed under Fenwick, who, by contract with Nall, claimed four hundred acres, of which the said fifty two were part.

Tarlton, in his life time, instituted a suit in chancery against Nall, Fenwick, Walker, Combs and others, for the purpose of obtaining the title. Such proceedings were had in this suit, that ultimately, two of the heirs of Tarlton, the others consenting, obtained the title to the fifty two acres mentioned in the bond of Combs, from the heirs of Nall. Tarlton and Nall both died before the contest as to the title was terminated, and their heirs, by revivor, brought the dispute to an end. The bond of Combs for a title was exhibited in the original bill, and made the foundation upon which Tarlton's claim to the fifty two acres rested.

Since the decree for a title, and since the execution of deeds in pursuance of the decree, the administrator and administratrix of Tarlton instituted their action of covenant, upon the bond of Combs, assigning breaches in his nonconveyance of the title, according to his covenant, and in his entire destitution of title. They obtained a verdict and judgment for nine hundred and seven dollars and fifteen cents: to reverse which, Combs prosecutes a writ of error.

Upon the death of Tarlton, who did the bond of Combs belong to? Did it pass to the administrators, or go to the heirs? The proper answer depends upon the time when the covenant was broken. If broken in the life time of the obligee, real covenants go to the administrator; otherwise to the heir. *Abney vs. Brownlee*, 2 *Bibb*, 170; *Hatcher vs. Galloway's Executors* *Id.* 180; *Pauling vs. Speed's Executor*, 5 *Mon.* 582. The covenant of Combs is of that description denominated *real*, according to the foregoing authorities.

And though the covenantee, in his life time, and after the breach, may have sought a specific execution, by bill in chancery, and his heirs may have revived the suit, and obtained the decree, *without making the personal representative a party*—he will not be bound by it: his right to the damages is not destroyed, nor his action barred, by such decree.—There may be a decree in favor of the heirs for a specific execution, saving the rights of creditors: but the personal representative is an indispensable party—his right, not affected where he is omitted.

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A writing binding the obligor to convey land, is a covenant *real*; which, if not broken in the life time of the covenantee, goes to his heirs; if broken in his life time, it goes to his personal representative; who is entitled to the damages for the breach.

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The covenant of Combs was broken in the life time of Tarlton, and hence his administrators, and not his heirs, are entitled to it. Tarlton, by the institution of his suit in chancery, manifested a disposition to coerce a specific execution of the contract by obtaining the title. But such manifestation cannot change the settled principles of the law. It is not like the case of *Darson &c. vs. Clay's heirs* 1 J. J. Mar. 168, where a devise of land, held by bond, is supposed to control the power which the administrator with the will annexed would otherwise possess.

Upon the death of Tarlton, the suit instituted by him was revived in the names of his heirs. His personal representatives were no parties to the suit. Conceding that a contract for land, violated in the life-time of the obligee, may be specifically executed in favor of the heirs, when the administrator consents, or even against his consent, when the rights of creditors would not thereby be prejudiced, still it is indispensable that the administrator should be a party to the proceeding which divests him of a legal right, and in effect transfers the obligation to the heirs. As the covenant of Combs belonged to the defendants in error, and as they were not parties to the suit in chancery, the decree cannot furnish any defence to this action.

In an action for breach of covenant in failing to convey land, the measure of damages is the purchase money and interest:—there can be no deduction for rents and profits received by the covenantee. If the covenantee has had possession, — has taken the rents & profits—has made improvements, or committed waste &c these things, too complicated for a jury, properly

The only remaining question, of any importance, relates to the amount of damages assessed. The verdict was made up of the purchase money paid to Combs and interest thereon. In the progress of the trial, two grounds were assumed upon which to lessen the damages: first, that the heirs of Tarlton having obtained the title, they ought not to hold it, and likewise compel Combs to repay the purchase money with interest to the administrators; and second, that the rents and profits of the land, which amounted to a large sum, ought to have been considered by the jury, and set off against the interest. Combs moved for instructions, embracing both points, which were overruled.

There is nothing in the first ground. If the conclusion, that the covenant on Tarlton's death belonged to his administrators, be correct, then the heirs had no

right to use it for the purpose of procuring the title, without bringing the administrators before the court. The legal rights of administrators cannot be divested by unauthorized proceedings on the part of the heirs.

The second ground is one of more difficulty. Where the profits of the land in possession of the vendor, is of more value than the interest of the money enjoyed by the vendor, it is utterly unjust to allow the vendee to recover the purchase money with its interest, and to hold the profits of the land. If the vendee is evicted by an adverse paramount claim, and becomes responsible to the evictor for the mesne profits, then he ought to recover interest from his vendor for as many years as he is or may be required to account to the evictor for the profits. But where the vendee is not bound to account for the profits of the land to any one, and where, as in this case, the profits greatly exceed the interest of the purchase money, manifest injustice would result from permitting the vendee to recover interest, and likewise to keep the profits. The principle upon which all contracts ought to be rescinded is, that the parties should be placed as nearly as possible in *statu quo*. If the contract between vendor and vendee is set aside by the chancellor, he would never give interest to the vendee, and allow him also to keep the profits. On the contrary, he would say to the vendee, as you have enjoyed all you contracted for, and as the profits of the land are as valuable, or more so, than the interest on the purchase money, you shall not have both; but if you require a restoration of purchase money and interest, you must restore, on your part, the land and its profits; but, as by the contract, you and the vendor regarded the land and purchase money equivalent to each other, I (the chancellor) will regard the use of each as of the same value, and take no account between you for interest or profits. This doctrine—where the land yields a profit, or can be made, by such care, attention and management as proprietors usually bestow, to yield a profit equal to the interest on the purchase money—is sustained by the clearest principles of reciprocal justice. But where the land yields no profit, and cannot

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belong to chancery, and must be settled there.

If a specific execution of a contract to convey land is decreed in favor of heirs: and the personal representative, also recover damages for the breach in failing to convey—the covenantor may be relieved from the double burden, in equity.

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be made to yield any, without improving it by the expenditure of money or labor or both, then there may be strong reasons for insisting, in case the contract be rescinded, that the purchase money with its interest should be restored by the vendor. In such a case, the vendee generally regards the prospect of a rise or appreciation in the price of the land, as the equivalent or consideration which he receives for the interest on the purchase money, and if he cannot, in consequence of the default of the vendor, get the land, being deprived of the contemplated rise which constituted the leading motive for the contract, and receiving no esplees, or profits, the land not being in a condition to yield any, justice would require the restoration of purchase money, with interest, upon a rescission of the contract. The cases first decided by this court, were, in all probability, of this description.

Whether the rules which would govern in chancery, can be applied with safety to a trial at law, has been a subject of much consideration with the court. The rules of right ought to be the same in every tribunal, and should be applied so as to settle controversies with all practicable speed. To avoid the expense and delay of another suit would be desirable, if insuperable objections did not present themselves. There are, however, too many questions growing out of the rescission of a contract between vendor and vendee put into possession, to allow them to be considered and settled by the jury upon the trial of an action of covenant. The vendor may be entitled to a set-off for the profits of the land, for waste and damage, and against these claims the vendee may be entitled to an allowance for improvements. To settle such multifarious and complicated matters, the chancellor is more competent to administer justice than the common law judge aided by the hasty inquiry of a jury. We shall therefore leave the rule at law to stand as we found it, and as recognized by the case of *Cox's heirs, vs. Strode*, 2 Bibb, 273. The vendee is entitled to his judgment at law for the amount of the purchase money and interest, and then the vendor may resort to the chancellor for a settlement of the rents, profits, waste and im-

provements, and for such decree as equity requires. Combs may have ample remedy in chancery, to prevent the double burden of the loss of the land and the payment of the judgment for damages.

It results from this view of the subject, that the judgment must be affirmed, with costs.

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Lowry

vs.

*Cox's Ex'ors
and heirs.*

Lowry against Cox's Executor and Heirs. CHANCERY.

[Mr. Crittenden for the Appellant: Messrs. Morehead and Brown for the Appellees.]

FROM THE CIRCUIT COURT FOR BRECKINRIDGE COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court. November 12.

For the consideration of six hundred dollars, Lowry sold an improved tract of land to Cox, and put him into the possession; which was retained by himself and his tenants under his executor, after his death, for about ten years; when the executor brought an action for damages, on Lowry's covenant for a conveyance of the legal title, and abandoned the possession. The executor having recovered a judgment, in that action, for nine hundred and fifty dollars—the principal sum which had been paid by his testator, Cox, and legal interest thereon from the date of the contract, Lowry filed a bill in chancery for a specific execution, or for a set off of rents and profits and waste.

On the final hearing, the circuit court decreed a set off for forty eight dollars; and Lowry has appealed.

There is no proof that Lowry had been guilty of fraud or bad faith; and the record exhibits nothing peculiar to distinguish this from the ordinary case of occupancy by the vendee, and inability by the vendor, without any unusual advantage to the one, or loss to the

Sale of land; vendee put in possession, under a covenant for the title;—vendor, from inability, without fraud, fails to make the title; vendee abandons the possession, brings his action on the covenant, and recovers the purchase money & interest. The vendor is, in equity, entitled to compensation for the use of the land, as a set-off against the interest.—The vendee is accountable for rents and profits, and for waste, during the time he held the possession, and is entitled to

an allowance for improvements, viewed as additions to the value of the land when it was abandoned: the balance against the vendee, on an account comprising these items, to be set off against the interest included in his judgment.

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Cox's Ex'ors
and heirs.

other. But there can be no decree *now* for specific execution.

It is a case, therefore, in which, according to the principles of equity recognized by this court, the use of the land should be set off against the judgment for interest, for the period during which the land was occupied under the contract, and in which the vendor has an equitable right, also, to a set off for any waste which shall have been committed during that occupancy, and should be charged with the value of all lasting and valuable improvements which shall have been put on the land by the vendee, or by any person holding under him, to be estimated, as ameliorations, according to their value at the time when the possession was rightfully abandoned, as it should be deemed to have been after the executor, by suing for damages, elected to rescind the contract. Such, according to the facts exhibited by the record, is the true measure of justice between the parties, and that which will reinstate them, as far as such an equitable object can be effected by the application of general principles of equity.

As the executor had a right to abandon the land when he had sued for damages and for a virtual rescission of the contract, no damage which may have accidentally occurred to the property since, or in consequence of his dereliction, should be charged to his account. Nor is he liable for mere deterioration, the natural consequence of ordinary use and of time.

Wherefore, as the appellant seems to be entitled to a set-off to a greater extent than that allowed by the circuit judge, the decree must be reversed, and the cause remanded, with instructions to ascertain the waste, if any, and the value of the improvements at the time when the executor abandoned the land, and, after deducting such value, so far as it shall exceed the amount of damage by waste, from the aggregate amount of the legal interest on the consideration during the occupancy of the land by and under Cox, to perpetuate the injunction, for the residue of that interest, and to dissolve it as to the remainder of the judgment, with ten per cent. damages.

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1834.

Hunt and Others *against* Forman.

CHANCERY.

[Mr. Haggin and Mr. Crittenden for Plaintiffs: Mr. Dana for the Defendant.]

FROM THE CIRCUIT COURT FOR FRANKLIN COUNTY.

At the Fall Term, 1833, Judge Nicholas delivered an opinion, reversing this case. A rehearing was granted, and the reargument took place, during the last Spring Term. Judge UNDERWOOD now delivered the following Opinion—Judge Nicholas concurring: the Chief Justice dissenting.

November 17.

FORMAN filed a bill to foreclose a mortgage executed by Throckmorton, after a lapse of more than twenty years. Hunt &c., vendees of Throckmorton, resist the demand set up, upon the presumption of payment resulting from lapse of time, and insist, that time alone constitutes a bar to the relief sought.

Forman attempts to escape the effect of time upon his demand: *first*, upon the ground that he was a non-resident; and *secondly*, upon the ground that Throckmorton was insolvent.

Since the repeal of the savings in our statutes of limitations in favour of non-residents, it may be well doubted whether the chancellor should, in any case, put a non-resident complainant upon a more favorable footing than a resident; but if there still exists an exception in favour of non-residents, Forman has not shewn himself entitled to it. He was in this state when the mortgage was executed. That, at least, is the legal presumption; for how else was the note and mortgage executed and delivered? He does not allege he was not here upon the execution of the note and mortgage. When he left the state does not appear. He may have remained here ten years, and have made a dozen visits since, for ought this court knows. After so long a delay, it was his duty by positive averment to shew every fact necessary to account for the delay; and this should be done in his bill,

The savings in favor of non-residents, in the statute of limitations, having been repealed by the act of '23, it may well be doubted, whether the chancellor should now place them on any better footing than residents.

A comp't in chancery, seeking to enforce a demand of more than 20 years standing, must account for his delay, & show, by explicit averments in his bill, such facts, as will rebut the presumption of payment arising from lapse of time.

In case of a bond and mortgage, the presumption of payment, from lapse of time, cannot be rebutted by shewing the insolvency

of the debtor: for as to the mortgagee and his debt, the debtor is not insolvent, because the creditor could, at any time, resort to the mortgaged premises, for payment.

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before the chancellor ought to listen to his complaint, about a demand so stale.

Disregarding Forman's non-residence, the *second* enquiry is as to the effect of Throckmorton's insolvency. This cannot account for Forman's delay. In respect to him and his debt, Throckmorton was not insolvent, because of the security resulting from the mortgage. Forman cannot say, I did not pursue my debt because I could get nothing, or, if he should say so, the answer is, you could have got it out of the mortgaged property, and if you did not, the presumption is, after twenty years unexplained delay, that the debt was otherwise paid, or, that it never had a *bona fide* existence. Suppose joint obligors, or joint and several obligors—principal and surety, and the obligee delays for twenty years: can he then sue, and repel the presumption of payment by proving that the principal was insolvent during the whole time? The fact, that he could have made the debt out of the surety, and did not, should conclude him, because it is contrary to the ordinary course of human conduct to hold up a just demand for twenty years, when it can be collected. Besides the insolvency is not alleged, it is only charged that Throckmorton was in "*humble circumstances*."

Decree reversed, and cause remanded with directions to dismiss the bill (Chief Justice dissenting.)

THE CHIEF JUSTICE'S DISSENT.

DISSENT and different view of the facts & pleadings, by the Chief Justice—who is of opinion, that the continued absence of the creditor from the state, or the insolvency of the debtor—facts which he conceives are sufficiently alleged and proved in this case

My opinion is, that there is not sufficient ground, in this case, for *presuming* payment of the debt.

First. The representatives of the mortgagor have not alleged, or intimated, that the debt had ever been paid; but, as to them, the bill has been taken for confessed.

Second. Hunt, who holds as a subsequent purchaser, for one thousand dollars only, does not allege, that the debt had ever been paid; but only relies on the lapse of time as, in his judgment, sufficient to repel the mortgagee's right to a foreclosure.

Third. Either the non-residence of the mortgagee, or the insolvency of the mortgagor, is sufficient, in my

opinion, to repel the presumption arising from the mere lapse of time; and I think, that both the non-residence and insolvency have been satisfactorily alleged, and established. The allegations of the bill cannot, I think, be fairly or consistently understood otherwise, than as importing, that the mortgagor had no means of payment, except the land which was mortgaged; and the proof abundantly shews, that he was insolvent, and continued to be hopelessly so to his death, in 1813.

The non-residence of the mortgagee is plainly alleged in the bill, and the allegations obviously imply, that he was not in this state when the debt became due, and has never been here since: moreover, the bond and the mortgage both describe him as a citizen of New Jersey; and I think that the mortgagor, and all others claiming under him, are estopped, so far as not to be allowed to deny, or require proof of, the fact so recited in the bond and in the mortgage. Without any proof, or even intimation, to that effect, I cannot presume that the mortgagee remained from home, and in this state, for one year after the execution of the mortgage; and feel bound, therefore, to presume, that he has not been in Kentucky since the debt became due, which was one year after the date of the mortgage.

The statutes, placing non-residents on the footing of residents as to the limitation of actions, do not, in my opinion, *destroy* the efficacy of non-residence in repelling, *as a fact*, the presumption, arising from lapse of time merely, that a debt has been paid. The reason why continued non-residence may repel the presumption of payment, is, because it shews the improbability of payment.

Nor can I admit, that the collateral security destroys the repellant efficacy of the mortgagor's insolvency.

The insolvency of the obligor may rebut the presumption of payment. *Moreland vs. Bennet*, 1 *Strange*, 652; *Rex vs. Stephens*, 1 *Burrow*, 431; 1 *Coventry's Povel*, 391, note 1;—and it was evidently the opinion of Coventry, that the fact, that the obligee had a collateral security by mortgage, will not destroy the rebutting efficacy

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—are either of them sufficient to rebut the presumption of payment arising from lapse of time: and, that the presumption of nonpayment, arising from the debtor's insolvency, is not rebutted, but rather confirmed, by the existence of a mortgage to secure the debt.

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of the obligor's insolvency. See notes to the first volume of *Coventry's Powel*, from 391 to 399 inclusive.

And is not this doctrine reasonable, consistent, and just? In a suit on a bond, which had been due for twenty years without any intermediate payment of interest, or any demand or acknowledgment, would a jury, after proof of the obligor's insolvency during the whole time, decide, that the debt had been paid, merely because the obligee held a mortgage, *which he had never enforced, and which afforded him ultimate security, not only for the principal debt, but for its accruing interest?* No case, as I confidently believe, can be found to sanction any such notion. The most rational inference that such a security would authorize, is, that the mortgagee had either taken the thing mortgaged in full discharge of his debt, or that, feeling sure of ultimate payment, he had preferred to let his money, thus secured, lie as a productive fund, yielding an annual increment of six *per cent. per annum.*

The legal, as well as rational, inference from the obligor's insolvency, is, that he could not have paid the debt without selling the mortgaged property, or his equity of redemption therein. And in this case, there is no pretence for presuming that, by any such sale, the debt was paid; because, the mortgagor's interest had been sold, in the year 1810, for only thirty three dollars, and he died utterly insolvent in 1813.

The existence of the collateral security, therefore tends, in my judgment, to impair, rather than to fortify, the presumption of payment. Had there been personal, instead of real security, surely an acknowledgment by the surety, that he had never paid the debt, ought to be sufficient to repel any presumption that it had been paid, when it is proved that the principal obligor was never able to pay it.

Here it is evident, that the land never paid the debt; and therefore I cannot presume, that the insolvent debtor paid it; more especially when there is not only no such allegation, but an admission by his representatives that he never did pay it.

It is my opinion, therefore, that the decree of the circuit court ought to be affirmed.

On the facts of this case, a suit at law on the bond, could not, I think, be barred by mere lapse of time; and, consequently, as the creditor is entitled to payment, I am unwilling to take from him his only means of obtaining payment, that is, a decree declaring that, *unless the debt be paid, the equity of redemption shall be barred and foreclosed.*

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Thoms
vs.
Southard,
& e converso.

**Thoms against Southard,
and
Southard against Thoms.**

CHANCERY:

2d 475.
110 92.

[Mr. Hardin and Mr. Guthrie for Thoms: Mr. Crittenden for Southard.]

FROM THE CIRCUIT COURT FOR JEFFERSON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court in this case—in the decision of which Judge Nicholas took no part.

November 18.

To reverse a decree rendered in favor of Southard against Thoms, the latter has appealed, and the former has prosecuted a writ of error.

Appeal and writ of error.

Thoms, who was sole owner of the steam boat Columbia, sold two thirds thereof to Courtland D Howell and Anderson Miller, in April, 1825, for seventeen thousand dollars; for ten thousand six hundred and sixty six dollars and sixty six cents, of which, remaining unpaid, they gave their promissory note, dated June the 2nd, 1825, and payable on the 15th of July, 1825; and, at the same time, they pledged or hypothecated their interest in the boat, for securing the payment of the amount of their note.

Sale of 1 of a boat, mortgage or pledge of that share to secure the payment; suit on the mortgage and other claims on the boat, in Jefferson circuit ct., and other facts of the case.

Immediately after the sale, Miller took the command of the boat, which had been and continued to be em-

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ployed in navigating the Ohio and Mississippi rivers, from Cincinnati (where she had been built) to New Orleans. The boat brought the owners in debt whilst Miller had the command of her; and, on the 15th of June, 1826, Thoms re-purchased Miller's interest in the boat, taking it *cum onore*, and allowing what Miller had agreed to give him for it; and shortly afterwards, Augereau Gray was employed to command the boat, in the business of transportation from Cincinnati to New Orleans.

On the 22nd of July, 1826, Thoms filed a bill in chancery in the Jefferson circuit court, in this state, for enforcing his hypothecation, or pledge, and asserting a lien for advances made by him and debts devolving on him; and, on the same day, the subpoena was served on Howell in Jefferson county, where he then lived.

On the 21st of June, 1826, Howell gave his note to Southard for upwards of eight thousand dollars; and in August, 1826, he confessed a judgment, without suit, for the amount of the note, in the *Oldham* circuit court; and agreed that a *feri facias* might be issued instantly, and levied on his interest in the boat, and that that interest might be sold without advertisement, and for whatever should be bid for it.

Thoms then filed a supplemental bill, alleging, among other things, collusion between Howell and Southard, for the purpose of defrauding him, and praying for a restraining order to prevent the sale under Southard's execution. The injunction was accordingly granted; and afterwards, in November, 1826, after Southard had answered the supplemental bill, the chancellor authorized a sale of Howell's interest, subject to the lien of Thoms, and it was so sold, and was bought by Southard, at the price of one thousand dollars.

The boat libelled at New Orleans; various claims, including all Thoms', brought in under the libel; sale of the boat there, and distribution of the proceeds by order of court, and

The boat, being still employed by Thoms, in its usual trade between Cincinnati and New Orleans, was afterwards, in December, 1826, libelled at New Orleans, in the District Court of the United States for Louisiana, by James Purdon, for six hundred and forty dollars and fifty nine cents, claimed by him for supplies which he had furnished in the City of New Orleans, whilst the boat was under the command of Anderson Miller.

Augereau Gray, the captain at the time of the seizure of the vessel by the marshal, under the libel, and other persons, who had claims for services on that boat, and for supplies furnished for her, intervened and asserted their claims also upon the boat.

By the intervention of Thoms, also, his claim secured by his mortgage, and other claims resulting from his advances and from debts which the boat had incurred prior to the sale under execution, were asserted.

Southard and Howell, *each claiming the proprietorship of one third of the boat*, answered the libel, and all the intervening claims, and denied the jurisdiction of the court. But, by the order of the court, the boat was sold by the marshal, and Thoms became the purchaser, at the price of thirteen thousand five hundred dollars; which was distributed by the court, among the different claimants; and afterwards the cause finally settled, as between Thoms, Southard and Howell, by decreeing to Southard two hundred and forty six dollars and forty six cents, to be paid by Thoms, and seventy seven dollars, to be paid by Augereau Gray, "*in full*" of the claims of Howell and Southard to "*the proceeds*" of the sale of the boat; and Southard's attorney received the sums thus decreed to him.

Afterwards Thoms pleaded that decree in bar of a claim which Southard had asserted in a cross bill in this case, for one third of the boat, and of the profits accruing since his purchase.

But the circuit court disregarded the decree of the District Court of the United States in Louisiana, and decreed, that Thoms should pay to Southard four thousand and fifty two dollars—that sum being one third of sixteen thousand dollars, for which Thoms had sold the boat after his purchase at the marshal's sale, and one third of the net profits of the boat from the date of Southard's purchase to the sale by Thoms, after deducting one thousand eight hundred and forty five dollars and eleven cents—the sum supposed to be due to Thoms under his hypothecation or pledge, and six per cent. interest on that sum.

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final decree between those claiming to be owners of the boat.

The N. Orleans decree pleaded in this case, but disregarded; the decree of the Jefferson circuit court, and objections to it here, by the parties respectively.

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Southard now complains, that the decree allowed him less than he was entitled to, and insists that Thoms had no lien on the boat as against him, because the mortgage, as he terms it, was never recorded.

Thoms insists, that the decree of the court in Louisiana, is conclusive as to all the same matters in controversy in this case; and that, if it be not conclusive, still he is entitled to several sums which he enumerates, and for which the circuit court refused to allow him a credit.

Many interesting points are presented, but we shall notice such only as we deem important to the decision of this controversy, and those we shall consider but briefly, and in their natural order.

Judg't, on a note, is confessed in a county where neither party resides; def't agrees that ex'on may be issued *forthwith*, and believed on the boat in controversy, and that she may be sold without advertisement: upon these, and various other facts and circumstances recounted in the text, it is held, that the note was the result of a combination to defraud another owner of the boat, and that the plaintiff in the judg't is not to be considered as a *bona fide* creditor.

I. Whatever may be the true state of case between Southard and Howell, this court must pronounce that judgment on the transactions between them, which the facts exhibited in the record authorize and require.— And thus considering the matter, we cannot judicially decide that Southard was a *bona fide* judgment creditor of Howell. The note on which the judgment, which Howell confessed, purports to have been rendered, bears date only one day prior to the service of Thoms' subpoena on Howell. There is no witness to that note. There is no proof that it was given on the day on which it purports to have been given. The original note has not been exhibited or proved, and the only evidence of the existence of such a note, is the judgment confessed upon it. There is no satisfactory or credible proof, that the note was given for a full, or legal, or valuable, or *bona fide* consideration, notwithstanding the charge in Thoms' bill, that it was the product of a fraudulent combination between Howell and Southard, to cheat him and to defraud the creditors of the boat. Howell is the only witness who speaks of any consideration, and his testimony is entitled to but little if any effect: *first*, because there are circumstances indicating that there was a combination between him and Southard, and that he was decidedly biassed and probably interested in favor of Southard, as in his own case. *Second*, because he is discredited by the inconsistency between his answer and his

deposition, in one of which he swore, that there was no usury in the alleged consideration for the note; and in the other he swore, that there was usury to an amount exceeding thirteen hundred dollars. Southard did not even suggest in his answer what was the consideration for the note. Though the parties both lived in Louisville, the judgment was confessed in Oldham county. Howell consented, that an execution should be issued *at once* and that all his interest in the steam boat, *furniture, tackling, &c* should be sold, without advertisement; and Southard directed the sheriff to leave the boat, after the levy, in Howell's possession, and directed him also to leave it in Howell's possession, *even after it should be sold*; thus shewing, either that the sale was to be merely nominal, or that it was to be chiefly, if not altogether, for the benefit of Howell; and in their answers, filed in the Louisiana court, both Howell and Southard claimed one third of the steam boat.

Such circumstances do not characterize Southard as a fair, preexistent, *bona fide*, judgment creditor of Howell for eight thousand dollars, or for any amount; and we do not, therefore, feel authorized to consider him as standing in the attitude of such a creditor in this case, so far as Thoms may be concerned.

But were Southard deemed a *bona fide* creditor of Howell, still his lien is not prior to that of Thoms.

Thoms had a prior lien in consequence of his pledge. The document introduced as evidence of that lien, recites, that Howell "*pledged, hypothecated and mortgaged*" his interest in the steam boat. Thoms and Howell were both in the possession of the boat at the date of the pledge, and Thoms retained his possession ever afterwards; and, though we will not say, that a technical mortgage of a steam boat (the mortgagee being in the possession,) need not be recorded, but will, for the present, leave that question open; still the registration of such a mortgage, on a thing so fugitive and almost ubiquitous, cannot, in many cases, effect the object of notice, intended by the law requiring the registration of

subject of the lien, it is held, that the transaction is a *pledge*, and not such a mortgage as must be recorded to give it validity.

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There is no law requiring a *pledge* to be recorded. Two persons are owners of a boat—both in possession; one being indebted to the other, gives him a lien on his share, reciting that he has "hypothecated, pledged and mortgaged it; the creditor continues his possession and control: considering the transitory, locomotive character and uses of the

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conveyances of other property to be recorded. These considerations and others which might be added, combined with the phraseology of the document itself, incline us to the opinion that it was intended to be, and should be deemed to have been, a simple pledge merely. And therefore, as no law required a pledge to be recorded, registration was not necessary to the validity or superiority of Thoms' lien acquired by the pledge; and, of course, Southard, even as a subsequent *bona fide* execution creditor, could not compete with Thoms.

A *bona fide* creditor, holding a mortgage to secure his debt, which is not recorded, but upon which he has instituted a suit, *in rem*, will be preferred to another creditor, or a purchaser, who acquired a lien or purchased, after the commencement of the mortgagee's suit; for the suit gives a lien independent of the mortgage. The party purchasing, or taking a lien, while the suit is pending, takes it *cum onere*, or subject to the mortgagee's claim: *p. 431.*

One, of two owners of a steam boat, files a bill against the other, to prevent him from selling his share, to enforce a mortgage on it, and subject the boat to a reimbursement of his own advances, and the claims of other creditors: he can

But if Thoms should be deemed a mortgagee, still, though his mortgage was not recorded, he acquired a prior and superior lien by his *lis pendens*. Were it admitted, that he was only a mortgagee, and that, in consequence of the non-registration of his mortgage, Southard's execution should have been preferred *at law*, still, as Thoms was also a creditor, and a prior and meritorious creditor, and, as a suit on his mortgage for a foreclosure was a proceeding *in rem*, and, *per se*, attached a lien to the thing proceeded against, before Southard had any lien, he might thereby—waiving the lien given by the simple mortgage—have acquired an equitable lien which could not have been divested by the levy of Southard's execution, *pendente lite*.

But the bill of Thoms was not for a foreclosure only; its chief object was to enjoin Howell from selling his interest in the boat, and to subject it to other claims, and to the demands of other creditors who held liens on it, and for whose demands Thoms was liable, and apprehended that, in consequence of Howell's insolvency, he would be solely liable. Upon this latter ground alone, he had a right to sue in chancery, to coerce a settlement of all joint accounts and liabilities, and to attach Howell's interest in the boat, as his only indemnity. And this alone, without any pledge or mortgage, gave to Thoms an equitable lien on Howell's interest in the boat, which could not have been divested or affected, by a subsequent execution, or even sale, *pendente lite*. *Scott vs. McMillan*, 1 *Littell*, 302, and, of course, as the court thus had jurisdiction on this latter ground, if upon no other, it would have been proper to adjudicate on

the whole controversy raised by the bill, even if a bill on the mortgage only had not, of itself, given an equitable lien.

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maintain his suit for this object, and have a final settlement of all transactions connected with the joint ownership; and the *lis pendens* gives the complainant an equitable lien, of which he cannot be divested, by any subsequent levy or sale.

Wherefore, had Southard been a *bona fide* creditor, and had Thoms been mortgagee, instead of pledgee, the lien acquired by the *lis pendens*, would have been prior, and superior in equity, to that acquired by the execution.

In this aspect of the case, had Southard been a *bona fide* creditor, and had the decree in Louisiana been inconclusive, it would be evident, that the circuit court erred to the prejudice of Thoms; for the established demands for which his bill was filed, and which he had a prior right to have satisfied, greatly exceeded those allowed by the circuit judge; and Southard should not come in until after the just demands sued for by Thoms, had been fully satisfied; for the *lis pendens* placed him (Southard) precisely in the attitude of Howell, and therefore he could have been entitled only to the residue of Howell's interest, after the debts for which Thoms had attached that interest had been discharged. In this view, Southard, even as a *bona fide* creditor, bought Howell's interest *cum onere*, even though it be admitted, that Thoms and Howell were not partners, but were tenants in common only, and that, therefore, neither of them was liable *in solido*, and neither had an inherent lien on the interest of the other, for debts incurred by the boat, or for any balance due to either of them individually.

But, if Southard could be deemed a *bona fide* creditor, he could not now be entitled to any decree against Thoms, because the decree in Louisiana is conclusive as to this controversy.

The courts of the United States have exclusive maritime jurisdiction. That jurisdiction extends as far as the ebbing and flowing of the tide. If the tide ebb and flow at New Orleans, the agreement on which the libellant's claim was founded, was a maritime contract.—

The courts of the U. States have an exclusive maritime jurisdiction, extending as far as the tide ebbs and flows.— Those who furnish supplies &c for vessels in foreign ports, or in a state where the owners do not reside, have

liens on the vessels, which they may enforce in a court of maritime jurisdiction, and the decree binds all parties interested.

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A steam boat, having been libelled in a federal court, having maritime jurisdiction, in another state, and that court having directed a sale of the boat, and distributed the proceeds among various persons who became parties, and established claims for which the boat was liable; and having made a final decree, settling the respective rights of the owners, claimants, and mortgagees, of the boat: & the decree being pleaded in a suit in this state, this court presumes — nothing appearing to the contrary — that that court had jurisdiction *in rem*, and of all the matters embraced by the decree; & holds it conclusive, & final, notwithstanding the suit here was previously commenced upon some of the same claims — *post* 484.

Such a contract, made in a foreign port, or in a state in which the owners of the boat did not reside, gave a lien on the boat itself, and authorized a suit *in rem*. *Abbott on Shipping*, 109; and “*The General Smith*,” 4 *Wheaton*, 438; *Condensed Reports*, 496. The decree of a court of admiralty, having jurisdiction *in rem*, is conclusive every where, and on all persons who have an interest in the thing. 1 *Dallas*, 54; *Cond. Rep.* 21; 9 *Cranch*, 126; *Cond. Rep.* 306.

This court does not know that the tide does not ebb and flow, to some extent, at New Orleans. We are indeed disposed to believe that it does, though its flux and reflux may be scarcely perceptible. But knowing nothing to the contrary, comity requires us to presume, that the District Court of the United States for Louisiana had maritime jurisdiction *in rem*, and had a right to decree the sale of the “*Columbia*” and distribute the proceeds. Having, or being presumed to have, competent power over the boat when it was seized under the libel of Purdon, the decree of the court must be conclusive on all the claims which were litigated in that case, and must bar Southard’s claim to any interest in the boat, or in its profits, unless the court, in its decree, as between him and Thoms, transcended its power, or unless Thoms should be estopped by his acts from relying on that decree.

First. This court cannot decide that the federal court transcended, in any particular, its maritime jurisdiction. The part owners of the boat were necessarily parties to the libel of Purdon; and, after paying the claims of the libellant and of the other strangers who had intervened, the court certainly had jurisdiction to distribute among the owners, what still remained of the proceeds of the sale of their vessel. This record does not shew what the proof was in that case. Perhaps it was proved, that Thoms and Howell were *partners* in the boat at the date of Southard’s purchase; or that Southard was not a *bona fide* creditor; and, in either event, Thoms would have had an available lien on Howell’s third of the boat, which the admiralty court, having jurisdiction over the boat, had a right to adjust; or, if there was no proof

that Thoms and Howell were partners, or that there had been collusion between Southard and Howell, still, as Thoms' pledge gave him a lien on Howell's interest in the boat, the court had a right to adjust that lien in the distribution of the avails of the sale of the boat. But, in any event, the court had undoubted jurisdiction to distribute the proceeds of the sale among the claimants and the owners of the boat. Whether that court had jurisdiction *in rem* as to the claims of all those who were made intervening parties, this court has not the means of ascertaining. The presumption, therefore, must be in favor of such jurisdiction. But that is not material, because, as the court had jurisdiction *in rem*, in consequence of Purdon's libel, and as between the owners of the boat, it had full power to adjust *their* conflicting claims; and if, in adjusting them, it allowed other claims, over which it had no cognisance, such an error would not invalidate the decree, or authorize this court to revise it, or to question it incidentally. But we have no reason to presume, that there was even such an error in the decree of the court in Louisiana. For, even had any of the claims been such as would not have given jurisdiction *in rem*, the appearance and answers of Howell and Southard would have given jurisdiction *in personam* over every maritime contract respecting the boat.

But it is sufficient, that the record does not shew that the decree was in any respect; extra-judicial. Thoms, owning two thirds of the boat and having a lien on the other third, had a right to a decree for adjusting his interest and claims; and the boat having been rightfully seized under Purdon's libel, all other claimants, over whose claims the same court had jurisdiction, had a right to intervene and claim a distributive share of the proceeds of the sale whenever it should be made.

Second. As part owner, and especially of two thirds, Thoms had a right to continue the boat in its accustomed employment between Cincinnati and New Orleans. And therefore, neither Southard nor Howell could have made him liable for even the total loss or destruction of the boat by accident at New Orleans or elsewhere, whilst

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The appearance of parties will enable a court of maritime jurisdiction to proceed upon contracts relating to a vessel, tho' the claims are not such as to give jurisdiction *in rem*.

Whenever a vessel or boat is libelled, all parties having claims for which she is liable, may intervene, & have decrees for their rightful shares of the proceeds.

A part owner of a boat may keep it employed, & will not be accountable to the others, if it is lost or damaged in the usual trade.

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it was so engaged. *Abbott on Shipping*, 70-1. Not only did neither Southard nor Howell attempt to enjoin Thoms from controlling the boat, but neither of them manifested any objection to the use he made of the boat; on the contrary, we may presume that it was the wish as well as the interest of all concerned that the boat should be employed as it was employed by Thoms, after the sale under the execution.

A party who has instituted a suit to subject a vessel or boat to sale, to satisfy demands to which she is, or can be made, liable, cannot translate the litigation, by sending her to a foreign port, and there libelling her himself. But, as part owner, he may send her, in her accustomed trade, to a foreign port; and if she is there libelled by another party, who may legally subject her to sale, the former may intervene, and claim his share of the proceeds; and—to prevent them from being distributed entirely to others—may bring in all his claims upon the vessel or boat, and thus, in effect, transfer the jurisdiction, rendering his first suit nugatory, and subject to dismissal.

It does not appear that Thoms had any agency in causing the boat to be libelled at New Orleans; or that he did, or omitted to do, any thing, in that respect, which should, as to himself, invalidate the decree of the court in Louisiana. Nor did the pendency of this suit affect the validity or operation of that decree. After having brought his suit in this court, and taken the boat to New Orleans, Thoms ought not to have translated the litigation of his claims to a foreign court; and therefore, should not be allowed to plead in this case, the decree of the foreign tribunal, had it been rendered upon his libel, and had no other person first attached the boat. But, as the boat had been libelled by another person, whose rights could not have been affected by the pendency of the suit in this state, and as Thoms might have lost the benefit of his prior lien, and have also lost the benefit of his claims against Howell, had he been passive or neutral in the libel case, he had a right to demand a just distribution of the proceeds of the sale of the boat, should its sale be decreed on Purdon's libel. Had he not intervened as he did, Southard or Howell might have gotten possession of the residue of the money for which the boat was sold after deducting the debts of other claimants, and thus he (Thoms) might have suffered irremediably; because that suit might, in that event, and probably would have been productive of nothing but costs and disappointment to himself.

The *lis pendens* in this state did not affect the maritime jurisdiction of the court of Louisiana, whilst the boat was at New Orleans; nor can it, therefore, affect the decree which was, in that case pronounced.

By that decree—whether right or wrong is now immaterial—Southard's whole claim to an interest in the

boat was adjusted and concluded, and thereby became *res judicata*.

It is suggested by his counsel, that, as he had bought only Howell's interest, subject to the lien of Thoms, no greater claim than that so acquired was considered by the court in Louisiana; and that, therefore, if the lien of Thoms was inferior to that of Southard's execution, Southard has, notwithstanding the conclusiveness of the Louisiana decree, a just claim on Thoms for damages, which he sustained in consequence of having been prevented by the injunction from selling Howell's absolute interest, unincumbered by the claims asserted in the bill of Thoms.

To this argument, a threefold answer may be given. *First*: this court cannot decide, from any thing now appearing, that, as between Southard and Thoms, nothing was litigated but the interest acquired by Southard's purchase under his execution; nor can this court say certainly, what points were involved, or what proof was introduced in that litigation.

Second. Thoms' "lien," resulting as well from his *li pendens*, as from his pledge, left to Southard, even as a *bona fide* creditor of Howell, nothing but Howell's interest, subject to that lien; and, therefore, Southard bought as much as he had a right to subject to his execution; and the court in Louisiana, even if it adjudicated, as between him and Thoms, only on the interest thus acquired, ought to have allowed—as it did—all the just claims on Howell, and on his original interest in the boat, before any thing was allowed to Southard for his derivative interest. *Third*: if Southard could be deemed to have been a *bona fide* creditor; if, as such, he had a lien superior to that which resulted to Thoms from his pledge, and from his suit *in rem*; and if the court in Louisiana, in consequence of Southard's purchase, subject to the lien of Thoms, did not allow him as much as he would have been entitled to had he not been prevented by the injunction of Thoms from purchasing Howell's entire interest unincumbered; and if, therefore, Southard had been subjected to loss in consequence of the injunction; still, even then, he would not have been entitled to any

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decree in this case ; because, as the chancellor did not, by *his* order, divest him of any possession of the boat, but only enjoined him from *selling* it, neither the same chancellor, nor any other, could decree damages on the injunction bond, or for any loss resulting from the *restraining* order. In such a case the remedy would be altogether and exclusively legal.

But, for the other reasons also, which have been suggested, Southard does not appear to be entitled to any decree whatever.

Wherefore, it is decreed and ordered, that the decree of the circuit court be reversed, and the cause remanded, with instructions to dismiss the bills and cross bills.

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TO

THE PRINCIPAL MATTERS

IN THIS VOLUME.

ABATEMENT AND REVIVOR.

1. If two joint obligors are sued, and one pleads *non est factum*, has a verdict in his favor upon the issue, and judgment in bar, the plaintiff may proceed to take judgment against the other obligor. But he cannot dismiss the suit as to him who pleads in bar, leaving him thereafter liable, and proceed against the other: the latter, if sued alone, might plead the non-joinder of his co-obligor in abatement, and cannot be deprived of the effect of this right, by such dismissal. *Hickman vs. Anderson*, 223.
2. Matter in abatement that might have been pleaded when the first plea was filed, or which existed before the last continuance, is not available at a subsequent term. But a former plea in abatement, or in bar, is no objection to filing another, alleging matter that has occurred since the last continuance. *Gaines vs. Conn's heirs*, 231.
3. A writ of right abates by the death of any one of the demandants. *Gaines vs. Conn's heirs*, 232.
4. Surviving demandants in a writ of right, cannot have judgment for all the land, when no right of survivorship appears by the record. Nor can any judgment be rendered in the action after an abatement as to one of several demandants, by his death, whether the whole right survive or not: for the suit abates; and none of the statutes authorizing revivors, apply to real actions. *Gaines vs. Conn's heirs*, 233.
5. The death of either party between verdict and judgment, in any action, shall not abate, or affect the suit; Act of '96, § 5—but this act does not apply to the death of a party before trial. *Gaines vs. Conn's heirs*, 233.
6. If one of several defendants in ejectment dies, the surviving parties cannot, by their agreement, revive the suit; the heirs or devisees of the decedent must be summoned; unless they appear in person, or by their

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attorney, and consent to the order of revivor.—See a late law on this subject—*Acts of 1832*, 248, or *Stat. Law*, 589. *Moss et al. vs. Scott*, 273.

7. A motion for a new trial is a mere incident to the suit: not a separate action, that abates by the death of the mover; its effects continue without any proceeding by his representative. *Turner's Administrator vs. Booker*, 335.
8. The death of a defendant, after judgment, and pending a motion for a new trial, does not abate the suit. *Turner's Administrator vs. Booker*, 336.

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ACCORD AND SATISFACTION.

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1. A mortgagee, like any other having a general or special property in goods converted, may maintain trover for the conversion. *Snyder vs. Hill*, 204.
2. Money, or property, bet on any game or hazard, and so forfeited by the act of '99, can be recovered, only by a *qui tam* action. *Hickman vs. Littlepage*, 344.
3. Money, or other thing, bet on an election, is forfeited, and may be recovered in the name of the Commonwealth, or by a *qui tam* action.—Act of 1823, Sec. 5. *Hickman vs. Littlepage*, 344.
4. *Case*—not trespass, lies against a master, for the act of his servant, committed without the authority or assent of the master. *Johnson vs. Castleman &c.* 378.
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6. Where the *very act* of the defendant, and *not a consequence* of that act, does the injury complained of—although it may have been *unintentional*, and the effect of mere negligence on the part of the defendant, he is liable to the action of *trespass*, for the damages. *Johnson vs. Castleman &c.* 379.
7. Where there has been an immediate, and *also*, a consequential injury from the *same act*, either trespass or case may be maintained—as for a

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tortious taking of chattels, where the plaintiff may waive the trespass, and bring trover. And, in general, for any act of a defendant, which, though it was the direct and immediate cause of the injury, was done unintentionally, and through negligence on his part, *either* action may be maintained. *Johnson vs. Castleman &c.* 379.

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1. Lands in this state do not pass by descent to heirs who are aliens, but vest in the Commonwealth, without office found. *Fry, Vaughan et al. vs. Smith et al.* 40.

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1. Judgments against heirs, upon obligations of their ancestors, are to be levied of estate descended, and if such judgment be entered without being so modified, the omission will be deemed a mere clerical misprison, which may be amended, at the same, or any subsequent term. *Roman vs. Caldwell's heirs*, 20.
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3. Amendment of an Officer's Return.—See *Service of Process*, 7.

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1. An appeal bond, in legal form, binds the surety to pay the amount of the judgment or decree appealed from, with costs and damages, in case of affirmance.—But a decree upon a bill to subject an equitable interest to the payment of a judgment—which orders the defendant to pay it by a given day, and directs a sale of the property to be made, upon his failure to comply with the order, is not a decree for the debt. And a bond, executed upon an appeal from such a decree, conditioned that the appellant shall prosecute the appeal with effect, or pay "*the amount recovered by the decree*," does not bind the obligors to the payment of the debt—as, that being otherwise established, the decree only makes the equitable interest liable for its payment. *Sumrall et al. vs. Reid*, 65.
2. The *amount in controversy* determines the right of appeal to the Court of Appeals: where the debt, or damages laid in the declaration and writ, is not less than \$ 100, and the judgment is for the defendant, it

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1. If the vendor of land holds a note, with an equitable lien, for the purchase money, his assignment of the note carries the equitable lien with it. *Edwards vs. Bohannon*, 98.
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3. The covenant of a lessee to pay rent, concerns the realty, and binds his assignee for the rent due after the assignment. *McCormick vs. Young*, 294.
4. Notes or bonds given for rent, the payment of which is secured by lease, not being of higher nature, do not extinguish the rent; for which the assignee of the lease is liable, notwithstanding the landlord may have taken the notes of his lessee, for it. *McCormick vs. Young*, 294.
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1. A contract to pay for work and labor, may be inferred from circumstances, without proof of any express agreement. *Coleman vs. Simpson*, 166.
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3. The plaintiff, a female, was placed, when a child, in defendant's family, and remained at hard labor, receiving but a bare support, until she was twenty four, when she was driven off; she then sued for pay for her services: held, that the case (the evidence more particularly recited in the text) should have been submitted to the jury—who, if they believed, from all the circumstances that defendant requested the plaintiff to do the work, and that there was a promise on his part to pay her, should have found, for her, the value of her services, from the time she came of age. But, if they believed that the services were voluntary, or intended merely as a recompense for her support, they ought to have found for defendant. Instructions as in case of a nonsuit, were erroneous.—*Coleman vs. Simpson*, 166.
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1. Attachments against absconding debtors can be issued only by a justice of the county where the defendant resides; but may be sent to any other county, and executed by any sheriff or constable. *McMeekin vs. Johnson and Beatty*, 459.
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1. The agreements which lawyers may make with their clients, for fees, are not restricted by law; and where there is no special agreement, the law will allow compensation according to the value of the services. *Downing vs. Major*, 228.
2. Contracts between lawyers and clients are subject to a severer scrutiny than those of ordinary men. If it appears, that a client, suddenly discovering, that he is in a perilous condition by reason of an unexpected occurrence in relation to his counsel—is induced to agree to hard terms with certain lawyers, for want of time to seek the aid of others; or, i

ATTORNEYS—continued.

it appears, that the client is persuaded by an attorney already retained, to make such a bargain with others to be associated with him, as he would not have made, but for that persuasion—the chancellor will relieve the client from the contract, or from the excess above a fair compensation for the services rendered. *Downing vs. Major*, 228.

3. The plaintiff in replevin (under the act of 1830) failing in his action, is liable to the defendant, for the reasonable amount of fees, above the taxed fee, which he has to pay to his attorney for services required in consequence of the replevin. *Yates et al. vs. Burdit et al.* 256.

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3. The personal representative, being entitled to the damages for a breach of covenant to convey land, when the covenant was broken in the life

BAR BY FORMER DECISION—continued.

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See *Bill of Particulars*, 8.

BARON AND FEME.

See *Husband and Wife*.

BASTARDS.

See *Devises and Descents*, 5, 6, 7.

BETTING.

See *Gaming*.

BILL OF EXCEPTIONS.

1. A bill of exceptions to a decision, that a particular question might be put to a witness, must show what testimony had been previously given—otherwise the Court of Appeals can not say that the question was improper. *Barger vs. Caldwell*, 130.
2. If a bill of exceptions, to the refusal of a court to give instructions, does not set out some evidence to which the instructions would apply, they may be deemed irrelevant, and this court will not decide that the refusal was erroneous. *Barger vs. Caldwell*, 133.
3. A bill of exceptions may be signed by three by-standers, upon the refusal of the judge to sign it, (Act of '93, Dig. 188;) and their signatures to the bill itself may be taken as a sufficient attestation of its truth; but where they sign a certificate that merely states that the bill was presented to the judge, and that he refused to sign it—this is no attestation that the bill contains the truth—which must appear by the record, for this court cannot receive it as an exemplification of the proof on the trial below. *Arnold vs. Leathers*, 287.
4. This court will presume, there was proof enough to sustain the judgment of the Court below, unless a bill of exceptions, showing a deficiency, states expressly, that it contains the whole. *McGowan vs. Hoy*, 347.

BILLS OF EXCHANGE.

1. A writing, exhibited to the payee of a bill, by which the drawee authorizes it to be drawn, and upon the faith of which it is purchased, is equivalent to an acceptance, and binds the drawee to accept and pay the bill. *Vance and Dicks vs. Ward*, 95.
2. Where the drawee of a bill is thus (1) bound to pay it, if the payee, to get an acceptance on the face of the bill, promises the drawee, that if the drawer does not take it up at maturity, he, the payee, will; such prom-

BILLS OF EXCHANGE—continued.

- ise is without consideration, not binding, and no defence to an action on the acceptance. *Vance and Dicks vs. Ward*, 95.
3. Notes discounted by the Bank of Kentucky, are placed upon the same footing with foreign bills of exchange, as to the remedy, and its effects, against the drawers and endorser—and them only: so that actions of debt may be brought against the drawers and endorsers jointly, or any one of them separately. But the representatives of a deceased drawer or endorser can not be joined with the survivors. *Tilford et al. vs. Bank of Kentucky*, 114.
 4. Inserting in a bill of exchange, a promise that the drawer will credit the drawee's note with the amount, does not make it a bill drawn on a particular fund; it leaves the drawee to pay as he can, and at all events; and does not affect the mercantile character of the bill. An order on a particular fund, the payment depending on the sufficiency of the fund, is not a valid bill of exchange; but if it is *payable at all events*, not upon a condition or contingency, though it may refer the drawee to a particular fund for reimbursement, it is, to all intents, a bill of exchange. *Early vs. McCart*, 414.
 5. A consideration for a bill of exchange, is implied, and need not be averred in the declaration. *Early vs. McCart*, 415.
 6. To an action on a bill, against a defendant who passed it to the plaintiff, fraud, or want of consideration, may be a good defence. Against an innocent holder (as a subsequent endorsee without notice) who obtained the bill, for a valuable consideration, before it was due, or any suspicious circumstance appeared, such a defence will not avail: but proof of fraud, or want of consideration, will put it upon the plaintiff to prove that he is an innocent holder, for a valuable consideration. Gaming and usurious considerations are exceptions to the general rule, and render the bill entirely void—even in the hands of a *bona fide* holder, without notice. *Early vs. McCart*, 415.

See *Pleas and Pleading*, 12.

BILL OF PARTICULARS.

1. A defendant indicted as a common gambler, is not entitled to a bill of particulars, or specification of acts intended to be proved against him. *The Commonwealth vs. Moore*, 402.
2. Barratry is an exception to the general rule: one indicted for that offence is entitled to a bill of particulars. *The Commonwealth vs. Moore*, 402.

BILL *pro confesso*.

See *Practice in Chancery*, 8.

BOARD, or Entertainment.

1. An *express* promise to pay for board, is not necessary to prevent the act of 1663, 1 Dig. 465, from defeating the recovery. If the entertainer gives the guest to understand distinctly, that his entertainment is not given in hospitality, but to be paid for, it will take the case out of the operation of the statute. *Henderson vs. Stringer*, 292.

BOARD, or Entertainment—continued.

2. The husband is bound to maintain his wife; and if he drives her off, or so treats her as to justify her leaving him, it entitles her to credit for necessaries. But for *board*, when he who received the wife, had not declared his intention to claim it, (1 Dig. 465,) there is no liability.—*Henderson vs. Stringer*, 292.

BOAT.

See *Steam Boat*.

BONDS.

1. A writing obligatory binds all who sign it as obligors—as well those not named in the body, as those who are. *Blakey &c. vs. Blakey et al.* 465.
2. Bonds upon Appeals. See *Appeals*, 1.
See *Notes*, 1, 2.

BOUNDARIES.

1. The lines of a survey, as marked by the original surveyor, (in general conformity to the patent courses and distances,) must be taken as the true boundary—the whole distance, or so far as they can be discovered. If the lines were never marked, or have been effaced, and their actual position cannot be found—the patent courses (so far) must govern.—But, whether the lines *were ever marked*, and if so, *where*, are questions of *fact*, to be proved, and determined by a jury, and not mere deductions of law to be decided by the judge. *Dimmitt vs. Lashbrook*, 2.

CARRIERS.

See *Common Carriers*.

CASE.

See *Action*, 4, 5, 6, 7.

CHALLENGE of Jurors.

See *Juries and Jurors*, 1.

CHANGE OF VENUE.

See *Practice in Suits at Law*, 9.

CHARACTER.

See *Evidence*, 29, 30.

CHAMPERTY.

1. A sale of land for which the vendor has recovered a final judgment—though the land remains in the possession of the defendants, the *lra. fa.*, not being executed—is not within the champerty act of 1824—the sale is not of a mere “pretenced title,” and is valid. *Jones vs. Chiles*, 35.
2. A conveyance, *by mortgage*, passes the legal title to the mortgagee; but if there is a possession of the land held adversely to the parties to the mortgage, it is within the champerty act of 1824, and void; and there-

CHAMPERTY—*continued.*

- fore, does not destroy the mortgagor's right of action against the tenants in possession. *Redman et al. vs. Sanders*, 69.
3. Conveyances of land in the adverse possession of any person, other than the vendor or vendee, are *void* merely—there is no forfeiture of the title for that cause. *Redman et al. vs. Sanders*, 69.
 4. Contracts to carry on land suits for part, or profit, of the land, are prohibited—the penalty, a forfeiture of the title of either party to the contract, to enure to the benefit of the occupant; who may plead or show the fact, in bar of any suit for the land, brought by any party to such contract. *Redman et al. vs. Sanders*, 70.
 5. An actual enclosure is not necessary to constitute a "possession," within the meaning of the champerty act of 1824. *Moss et al. vs. Scott*, 274.
 6. Conveyances made anterior to the champerty act, are not affected by it. *Moss et al. vs. Scott*, 274.
 7. Where there is no one upon the land, against whom a claimant could bring his action, to try his right, there is no adverse possession, within the meaning of the champerty act. *Moss et al. vs. Scott*, 275.
 8. The title of the defendant in an execution, to land in the adverse possession of a stranger, may be sold by the sheriff.—1 *Dana*, 211.—But, to sales by a purchaser under the execution, the champerty act applies; and he can neither convey the land, while the adverse possession continues, nor make any champertous contract concerning it. *Violett vs. Violett*, 325.
 9. Though it may be unconstitutional to declare the title of the parties to a champertous contract, forfeited to the state, for the benefit of an adverse occupant: yet there can be no doubt of the power of the legislature to authorize an investigation of the circumstances under which a suit is commenced and carried on; and to ascertain for whose benefit it really is, and to withhold the right of recovery, where it appears to be founded on a champerty contract. *Violett vs. Violett*, 326.

CHARITABLE USES.

1. The English statutes of mortmain and of charitable and superstitious uses have ever been construed as applying to *corporations* exclusively. The 23 of H. VIII. c. 10, which declares, that certain feofments, made in trust, to the intent to have obits perpetual—the continual services of a priest &c. shall be void, have never, to this day, been held to invalidate trusts made for charitable and useful purposes *not deemed superstitious*. *Gass and Bonta vs. Wilhite &c.* 175.
2. The statute 43 Eliz. of charitable uses, is in force in this state; and consequently, though there were a defect or want of *cestui que trust* to take the use &c. or if the use were of a character too indefinite and uncertain to be enforced independent of the statute, the trust would *not* therefore be *void*—as the chancellor could obviate those difficulties.—*Gass and Bonta vs. Wilhite &c.* 177.
3. Where a conveyance is made of property to be held in trust, it is not the less for a charitable use, because the founders or contributors to the fund

CHARITABLE USES—continued.

reserve to themselves the right of partaking of the benefits of the charity, nor because they are members of the society for whose use and benefit the property is held. *Gass and Bonta vs. Wilhite &c.* 178.
See *Shakers*, 6.

CHOSSES IN ACTION, AND EQUITABLE INTERESTS.

1. A return of no property is indispensable, as the foundation of a suit to subject an equitable interest to the payment of a debt, under the act of 1928. *Edwards vs. Bohannon*, 98.
2. If the vendor of land holds a note, with an equitable lien for the purchase money, his assignment of the note carries the equitable lien with it.—*Edwards vs. Bohannon*, 98.
3. Legatees appoint an agent, who receives their legacies from a foreign executor. Creditors of the testator attempt to attach the fund in the hands of the agent, by a proceeding in chancery, with injunction restraining him "from paying over the money, or putting it out of his hands." The injunction being dissolved, at the instance of the legatees, and the agent having, in the mean time, left the state, insolvent, they sue the attaching creditors, for the injury resulting from the injunction. Held, that, as the agent was not debtor, or garnishee, of the executor, and could not avail himself of the injunction to resist paying over to his principals (though he might have enjoined them, giving security, and compelled them to interplead with the creditors,) they were not prevented from coercing payment from him; and had, therefore, no cause of action against the attaching creditors. *Scott vs. Lindsay et al.* 241.

See *Parties to Suits in Chancery*, 5. *Husband and Wife*, 9, 10.

CLOCK.

Sale of. See *Condition Precedent*, 1.

COMMISSIONS, (*Agent's Compensation.*)

1. A guardian may be allowed for his services, five per cent on the amount he pays over to his wards. *Hughes &c. vs. Smith*, 253.
2. Sheriffs were not entitled (before the act of 1830) to half commission for levying executions on goods that are afterwards replevied out of their hands. *Yantis et al. vs. Burditt et al.* 257.

COMMON CARRIERS.

1. Common carriers are accountable for the goods which they undertake to carry, unless the loss or damage is the result of inevitable accident, or the act of God. *Robertson &c. vs. Kennedy*, 430.
2. Those who make a business of transporting goods, for pay, from place to place, (by themselves or servants,) including draymen, cartmen, porters, drivers of ox-sleds &c.—are common carriers. *Robertson &c. vs. Kennedy*, 430.

CONCEALMENT.

See *Fraud*, 1, 2.

CONDITION PRECEDENT.

1. A clock-maker sells a clock, and takes the note of the purchaser, to whom he gives a writing, warranting the clock sold, and stipulating, that, if it does not perform well, he will take it back, and furnish one that will, and that, if he fails to furnish a good one, he shall have no pay: held that this writing, connected with proof that the clock was bad, and was returned, or tendered back—or that there was a sufficient excuse for not offering to return it, would amount to a defeasance of the note. But the writing will not by itself amount to a defeasance; and would not be available as a defence to an action on the note, without the proof *aliunde*. But the clock-maker having taken back the clock, under his agreement to furnish another and a *good one*, if the first did not perform well, or have no pay—the delivery of a *good clock*, in lieu of the one taken back, became a *condition precedent*; the performance of which he must prove, before he can recover on the note. The clock being left at the purchaser's house, must be deemed, not an acceptance of it by him, but merely a willingness to try it. *Warner's Executors vs. Reedon*, 219.
2. Upon an obligation containing a stipulation, that the obligee shall do some act before he shall enforce payment, no suit can be maintained, until the act is done, and the obligee has given notice of the performance on his part, to the obligor; which notice must be direct and authentic; information derived by the obligor, from one not authorized or requested by the obligee, to give it, is not a sufficient notice. *Hodges vs. Holeman*, 896.

CONSIDERATION.

See *Bills of Exchange*, 1, 2, 5, 6.

CONSTABLE.

1. A constable is not liable for any failure to act upon an execution issued upon a mere common law bond, not having the force of a judgment. *Williams et al. vs. Hall*, 97.
2. The measure of responsibility of an officer for failing to return, in due time, an execution for commonwealth's notes, is the value of the notes at the return day, with interest and damages. And there must be proof of the value of the notes, or the judgment will be erroneous. *Williams et al. vs. Hall*, 97.

CONSTITUTION.

See *Shakers*, 5.—*Champerty*, 9.

CONSTRUCTION.

1. Written obligations may refer to other papers for names, sums &c. The endorsement of a "promise to pay the amount of the within note," is a valid obligation, although it does not name the person to whom payment is to be made. The payee, as well as the amount, of the note and of the endorsement, must be the same, and the reference makes all sufficiently certain. *Bullen et al. vs. McGillicuddy*, 90.
2. A clock-maker sells a clock, and takes the note of the purchaser, to whom

CONSTRUCTION—continued.

he gives a writing, warranting the clock sold, and stipulating, that, if it does not perform well, he will take it back and furnish one that will, and that, if he fails to furnish a good one, he shall have no pay: held that this writing, connected with proof that the clock was bad, and was returned, or tendered back; or that there was a sufficient excuse for not offering to return it, would amount to a defeasance of the note. *Warner's Executors vs. Reardon*, 219.

3. Construction of a Statute—See *Statutes*.

4. Construction of Wills—See *Wills*, 14. See also, *Contracts*, 2. *Conveyances*, 13. *Evidence*, 11.

CONTRACTS.

1. In the absence of proof of fraud, or of mistake in drawing a contract, or subsequent modification of its technical import—a written contract must have the same effect in chancery, as at law—parol testimony, to change its effect, being inadmissible. *Harrison vs. Talbot*, 259.
2. B sells land—first to L and H, then to C; who pays \$ 50 down, and gives his note for \$ 100, which B agrees shall not be paid unless the sale to L and H was cancelled; it was not cancelled, and C purchased L's interest. Suit is brought on C's note for \$ 100, and he defeats the action, upon those facts. The agreement, as construed here, authorized B to retain the \$ 50, and C to retain the title B had conveyed to him; and held, that there is no ground for a rescission of the contract. *Cameron vs. Bell &c.* 328.
3. Two persons—one an infant, are joint claimants of a lot; the elder sells it, and covenants to deliver the deed of both, upon payment of the purchase money; the whole falls due, payment is enforced, and the deed made and tendered, according to the stipulation, before the infant attains to majority:—The vendee cannot object to the deed on account of the infancy of one of the grantors—for such a deed is all that the covenant calls for. *Beckwith vs. Marryman and Others*, 372.
4. Rescission of Contracts—See *that title*.
5. Contracts of Locators of Land. See *Equity*, 1, 2.
6. Contracts between Attorneys and Clients. See *Attorneys*, 1, 2.
See also, *Champerly*, 4. *Condition precedent*, 2. *Evidence*, 4. *Equity*, 6. *Injunctions*, 1. *Sales of Land*, 1, 9, 10, 15.

CONVERSION.

See *Husband and Wife*, 4.

CONVEYANCES.

1. An unrecorded deed has no effect against a subsequent *bona fide* purchaser, for a valuable consideration, without notice: but whether the party to be prejudiced by the deed, is that description of purchaser, or not, is a question to be determined by a jury, not by the court. *Chiles et al. vs. Conley's Heirs*, 23.
2. Any writing that identifies the parties to a contract for land—describes it—acknowledges a sale in fee of the vendor's right, for a valuable con-

CONVEYANCES—*continued.*

- sideration, and is signed and sealed by the grantor, and duly attested, is a good deed of bargain and sale, however concise or summary the language may be. *Chiles et al. vs. Conley's Heirs*, 23.
3. A deed conveying the fee simple of land to the grantee, although it contain a declaration that the grantee's name is only used in trust for another, nevertheless passes the legal title to him, and there can be no recovery, at law, in the name of the *cestui que trust*. *Fry, Vaughan et al. vs. Smith et al.* 40.
 4. Conveyances of land in the adverse possession of any person, other than the vendor or vendee, are *void* merely—there is no forfeiture of the title for that cause. *Redman et al. vs. Sanders*, 69.
 5. No specific appropriation of the proceeds of land devised to be sold, being made, the purchaser is not bound to see to the application of the purchase money. And even where there is such an appropriation, and the purchaser fails to attend to it, the conveyance is, nevertheless, valid at law: the remedy is in chancery. *Muldrow's Heirs vs. Fox's Heirs* &c. 85.
 6. The deed of a commissioner, appointed to sell and convey land under a decree so drawn as to include more land than the decree authorizes him to sell, may pass the title to the land embraced by the decree: no more. *Moss et al. vs. Scott*, 272.
 7. Conveyances made anterior to the champerty act, are not affected by it. *Moss et al. vs. Scott*, 274.
 8. A deed not proved in time to be recorded, is good between the parties to it. The grantee, upon accepting it, should have it proved and recorded. *Taylor vs. Lyon*, 277.
 9. A grantor may make a deed with an intent to defraud creditors: yet, if it be made upon a fair and bona fide consideration, to one who had no participation in, or knowledge of, the grantor's fraudulent intent, it will be good and valid. *Violett vs. Violett*, 324.
 10. The title of the defendant in an execution, to land in the adverse possession of a stranger, may be sold by the sheriff.—1 *Dana*, 211.—But, to sales by a purchaser under the execution, the champerty act applies; and he can neither convey the land, while the adverse possession continues, nor make any champerty contract concerning it. *Violett vs. Violett*, 325.
 11. That a deed was made for a *fraudulent* purpose—as to screen the land from creditors, may be shewn, by parol proof; and the fraud being established, a sale of the land under execution against the grantor, will pass the title. *Staton et al. vs. The Commonwealth for Gill*, 399.
 12. A suit to subject an equitable estate to the satisfaction of a debt, creates a lien upon the estate, commencing with the institution of the suit, and overreaching all subsequent conveyances and levies. *Watson vs. Wilson*, 410.
 13. The owner of a tract of land, patented as 1000 acres, sells 750 undivided; the vendee acquires the interest of a locator, and under that claim, obtains a decree and conveyance for “a fourth of the land—being the bal-

CONVEYANCES—*continued*.

once after deducting the 750 acres;" it turns out, that there are 1650 acres in the tract: the vendee is entitled to his 750 acres, by his purchase, and by his decree, to one fourth of the whole tract only, (the words "being the balance" &c. obviously inserted through misconception of the true quantity, being inoperative;) the residue of the tract (surplus) remains to the patentee, or his assigns. *Cates &c. vs. Woodson*, 456.

See *Sales of Land*, 1, 3. *Fraud*, 3. *Lunacy and Lunatics*, 3.

COSTS.

1. If a suit is prematurely brought, but afterwards, upon the cause of action becoming complete, and the pleadings being amended, the relief is afforded—the complainant must pay costs up to the time of the amendment. *Kavanaugh vs. Thacker's Administrator and Distributees*, 138.
2. Where a suit in chancery is brought, to recover land, against several defendants, who hold and defend, some under one title, some under another, unconnected with each other: if the bill is dismissed and costs decreed to the defendants, the taxation is to include as many attorney's fees—\$10 each—as there are separate and independent titles and defences. *Hart's Heirs vs. Young et al.* 156.
3. Upon an *ex parte* proceeding—such as a motion to instruct a clerk as to a taxation of costs—no costs are recoverable. *Hart's Heir's vs. Young et al.* 156.
4. A motion was made in the court below, to direct the clerk to include several attorney's fees in the costs of a suit: it was so ordered, and that the other party to the suit pay the costs of this motion. In this court, the direction to the clerk is approved, but the order as to the costs of the motion, reversed—no costs or damages given in the Court of Appeals. *Hart's Heirs vs. Young et al.* 157.

COVENANT.

1. Where the condition of a penal bond, or the effect of a covenant, is, that the obligor, or covenantor, shall restore or deliver a certain slave, at a specified time,—and after the execution of the writing, and before the time for the restoration or delivery of the slave, he *runs away*, or dies, and the obligor, or covenantor, cannot recover him, by proper efforts and diligence, he shall be excused from performance; and no action can be maintained against him for this breach. *Keas et al. vs. Yewell*, 248.
2. A writing binding the obligor to convey land, is a covenant *real*; which, if not broken in the life time of the covenantee, goes to his heirs; if broken in his life time, it goes to his personal representative; who is entitled to the damages for the breach. And though the covenantee, in his life time, and after the breach, may have sought a specific execution, by bill in chancery, and his heirs may have revived the suit, and obtained the decree, *without making the personal representative a party*—he will not be bound by it: his right to the damages is not destroyed, nor his action barred, by such decree. There may be a decree in favor of the heirs for a specific execution, saving the rights of credi-

COVENANT—*continued.*

tors: but the personal representative is an indispensable party—his right not affected where he is omitted. *Combs vs. Tarlton's Administrators*, 465

3. In an action for breach of covenant in failing to convey land, the measure of damages is the purchase money and interest: there can be no deduction for rents and profits received by the covenantee. If the covenantee has had possession; has taken the rents and profits; has made improvements, or committed waste &c. these things, too complicated for a jury, properly belong to chancery, and must be settled there.—*Combs vs. Tarlton's Administrators*, 466.
4. If a specific execution of a contract to convey land is decreed in favor of heirs; and the personal representative, *also* recovers damages for the breach in failing to convey—the covenantor may be relieved from the double burden, in equity. *Combs vs. Tarlton's Administrators*, 467–9.
5. Covenant not to sue. See *Release*, 1.
6. Covenant, or Articles of Association, of the Shakers. See *Shakers*, 1, 2.

CROP.

See *Sales under Execution*, 2, 3, 11.

CROSS BILL.

See *Practice in Chancery*, 5, 6. *Parties to Suits in Chancery*, 3.

DAMAGES.

1. Where a mortgagor, in obedience to an order of court, gives bond to have the mortgaged property forthcoming, to answer the decree—(page 243–9)—the measure of damages, in an action on the bond, is the amount of the decree, if that is *less* than the value of the property; otherwise, the value of the property. *Keas et al. vs. Jewell*, 250.
2. The damages given, by the act of 1830, against the plaintiff in replevin who fails in his action, are *ten per cent* on the goods replevied, if that is less than the amount of the execution, and on the amount of the execution where the value of the goods exceed it—*without regard to time*. *Yantis et al. vs. Burditt et al.* 256.
3. In an action for breach of covenant in failing to convey land, the measure of damages is the purchase money and interest:—there can be no deduction for rents and profits received by the covenantee. If the covenantee has had possession,—has taken the rents and profits—has made improvements, or committed waste *etc.* these things too complicated for a jury, properly belong to chancery, and must be settled there. *Combs vs. Tarlton's administrators*, 466.

See *Replevin*, 2. *Officers*, 5. *Equity*, 8, 9.

DECREES.

1. A decree upon a bill to subject an equitable interest to the payment of a judgment—which orders the defendant to pay it by a given day, and directs a sale of the property to be made, upon his failure to comply with the order, is not a decree for the debt. (See *Appeals*.) *Sumrall vs. Reid*, 65

DECREES—*continued*.

2. A decree rendered upon constructive service of process, remains in force although the defendants may have obtained an order to open it, filed answers &c.—until it is *set aside* by sentence of the court, *after the hearing* upon the matter of the answers ;—and the pendency of a suit upon the answers so filed, cross bills &c. will not prevent the prosecution of a writ of error, and reversal of the decree. *Davis' Heirs vs. Bentley*, 247.
3. Where there is a decree against several absent joint defendants, which they may open, or reverse—one cannot, by obtaining an order to open the decree and filing his separate answer, affect the right of the whole to their writ of error. *Davis' Heirs vs. Bentley*, 247.
4. A decree, upon a bill for a foreclosure and sale, which orders, that, unless the defendant pay so much, by such a day, his “equity of redemption in and to the mortgaged premises,” shall be sold, authorizes the sale of that *equity only* :—not of the mortgagee's interest—especially where the advertisement and deed by the commissioner, are in conformity to the decree, and the sum produced by the sale, inconsiderable.—Such a deed does not pass the legal title to the estate. *Southard vs. Guthrie*, 340.
5. Every order or decree made in a chancery cause, which decides upon, and settles the rights of the parties, as to any particular matter, is so far final ; an appeal or writ of error may be prosecuted upon it—although the suit remains in the court below, for other matters in the bill to be adjudicated upon ; and the time to bar a writ of error upon any such order or decree, is to be computed from *its* date—not from the date of the last decision in the cause. *Banton and Wife vs. Campbell's Heirs &c.* 422.
6. A decree for the distribution of money among heirs, should show how much each is entitled to : it should not be left open, for administrators or commissioners, to ascertain the respective portions. *Banton and Wife vs. Campbell's heirs, &c.* 423.
7. A decree cancelling a sale made by a lunatic, in a suit in which his vendee was not before the court, does not bind the latter. *Cates &c. vs. Woodson*, 454.
8. A decree against several defendants, will not affect the rights of one who was not before the court, and is erroneous as to all ; yet, until reversed, it is operative on those defendants who were regularly before the court. *Cates &c. vs. Woodson*, 455.

See *Conveyances*, 13. *Jurisdiction* 10,

DEEDS.

See *Conveyances*.

DEFEASANCE.

See *Condition precedent*, 1.

DEPOSITIONS.

See *Evidence*, 34.

DETINUE.

1. Detinue cannot be maintained where the thing sued for had ceased to exist when the suit was brought—as for a slave after his death : though it may be maintained where the defendant has parted with the possession of the chattel sued for, or where it was in being when the action was instituted, but perished afterwards. *Caldwell vs. Fenwick*, 332.

DEVASTAVIT.

See *Executors and Administrators*, 11.

DEVICES AND DESCENTS.

1. Lands in this state do not pass by descent to heirs who are aliens, but vest in the commonwealth, without office found. *Fry, Vaughan et al. vs. Smith et al.* 40.
2. Land devised to be sold, may be sold by the *acting executors*, where no one is appointed by the will to make the sale, or the nominee refuses to act, or dies before the sale. *Statute of '97*, § 44. *Muldrow's Heirs vs. Fox's Heirs &c.* 76.
3. If a testator devised land to be sold, to educate his children, it may be thence inferred, that he intended the sale should be made during their minority. *Muldrow's Heirs vs. Fox's Heirs &c.* 84.
4. No specific appropriation of the proceeds of land devised to be sold, being made, the purchaser is not bound to see to the application of the purchase money. And even where there is such an appropriation, and the purchaser fails to attend to it, the conveyance is, nevertheless, valid at law : the remedy is in chancery. *Muldrow's Heirs vs. Fox's Heirs &c.* 85.
5. Bastards have no inheritable blood, and cannot have either brothers or sisters, in legal contemplation ; those of the same mother cannot derive estates of inheritance from, or through each other. The statute of descents (§ 18) enables them to take real estate by descent immediately from or through the mother, in the ascending line, and transmit it to their line as descendants, in like manner as if they were legitimate. But it gives them no capacity to take an inheritance from, or transmit one to, collateral kindred. *Scroggin vs. Allan et al.* 363.
6. Where an infant dies, without issue, having title to real estate derived by descent from the father, his mother shall not succeed thereto, if there be living any brother or sister of such infant, or of his father, or descendant of either—*Statute of Descents*, section 5. But the statute intends *legitimate* brothers &c. ; if there be none such, the mother succeeds to the estate. *Scroggin vs. Allan et al.* 363.
7. Opinion of Judge Underwood, dissenting from the majority of the court—that the 18th section of the act of descents, of 1796, places bastards upon the same footing, in all respects, as it regards inheritance on the part of the mother, with those that are legitimate. *Scroggin vs. Allan et al.* 365.
8. When the legal title to land, sold by executory contract, has descended to the vendor's heir, who, as such, is entitled to the purchase money

DEVICES AND DESCENTS—*continued*.

through the executor of his ancestor, and he (the heir,) dies, the legal title passes to his heir, and the right to the unpaid purchase money to his personal representative. *Muldrow's executors &c. vs. Muldrow's heirs &c.* 386.

9. A slave is devised to a daughter for life, and, at her death, to give it to any of her children, or emancipate it; the daughter having died without exercising the power, acquired but a life estate, and the right to the slave reverts to the deviser's executor. *Pate vs. Barrett and Wife*, 426.

See *Husband and Wife*, 2.

DILIGENCE.

1. To a *lis pendens* purchaser, and to a purchaser with notice of an outstanding equity, the same rules as to diligence, apply. *Watson vs. Wilson*, 410.
2. A pending suit, and an outstanding equity, must be *alike* prosecuted and asserted with diligence, to prevent a purchaser from being exonerated: but what degree of diligence is required,—and what suspensions may be allowed, has not been clearly defined: culpable negligence, in either description of case, would no doubt be fatal. *Watson vs. Wilson*, 411.—And—
3. Where a suit has been instituted to subject an estate to the satisfaction of a debt, and a defendant dies, if the complainant fails to revive the suit within a reasonable time, he may lose the benefit of the lien created by the suit; and one who purchases the estate between the abatement and revivor, but after a lapse of time within which it ought, *prima facie*, to have been revived, may hold it notwithstanding the *lis pendens* subsequently revived, unless the complainant can show a good excuse for his delay in reviving. *Watson vs. Wilson*, 412.

DISMISSION OF A SUIT.

See *Bar by former decision*, 2.

DISSEISIN.

See *Landlord and Tenant*, 7.

DISTRESS.

See *Rent*, 4, 10, 11.

DISTRIBUTION.

1. In a suit *at law*, upon an executor's or administrator's bond, for a refusal to make distribution, it may be necessary for the plaintiff to aver and prove, that, before the suit, he tendered a bond to refund in case debts should appear: in chancery, the rule is not so strict;—there, the whole controversy may be settled, though no bond has been tendered, and the complainant, first being required to give the bond, may have the appropriate relief. *Kavanaugh vs. Thacker's Administrator and Distributees*, 137.

See *Dower*, 2. *Decrees*, 6.

DOWER.

1. A man makes a bill of sale to his brother, in secret, of all his slaves, and dies, leaving a will in which he provides for his widow. She thinks of renouncing the provision and taking the dower allowed by law, and consults the brother on the subject. He, nevertheless, conceals from her the fact, that the slaves had been conveyed to him, until she has made an election not to take under the will :—held that the concealment was a fraud upon the widow—in consequence of which she shall be allowed her dower in the slaves, notwithstanding the secret conveyance in the husband's life time.. *Morrison vs. Morrison's Widow, &c.* 14.
2. Where there is a devise of *real estate* to a wife, without any declaration in the will, that it is to be in lieu of dower, she is not put to an election; but may take both devise and dower. But, as to the husband's personal estate—her right to distribution depending on his dying intestate—she cannot take under and against the will; she must make her election, within the time (12 months) allowed by law, and cannot come in for a distributable share, unless she renounces entirely the provision made for her by the will. *Shaw's devisees vs. Shaw's administrator, 342.*
3. The filing of a bill by a widow, for dower &c. is not equivalent to a renunciation of the provisions of the will: the renunciation must be made in the mode, and within the time, required by the statute. *Shaw's devisees vs. Shaw's administrator, 343.*
4. Administrators have no authority to procure an assignment of dower; the widow and heirs are not bound by proceedings upon their motion. *Stevens' heirs vs. Stevens' widow, 429.*

DRUNKENNESS.

See *New Trial, 7.*

DWELLING HOUSE.

See *Service of Process. 12, 13.*

EJECTMENT.

1. A purchaser, *pendente lite*, from the landlord of tenants sued in ejectment, is bound by the judgment, for, or against, them. *Jones vs. Chiles, 34.*
2. There can be no recovery upon a demise in the name of one who was dead at the institution of the suit. *Fry, Vaughan, et al vs. Smith et al. 39.*
3. Confession of lease, entry and ouster, supersedes the necessity of any proof of actual ouster—even when the tenant claims to hold as tenant in common with the plaintiff. *Fry, Vaughan, et al. vs. Smith et al. 40.*
4. The declaration in ejectment must be filed on the first day of the term to which the notice is returnable. If filed afterwards, it is irregular, and the judgment subject to reversal. *Fry, Vaughan, et al. vs. Smith, et al. 40.*

EJECTMENT—*continued.*

5. The demise cannot be extended after a judgment in ejectment. *Coghill's Heirs, vs. Burriss, 57.*
6. An order extending the demise made after the judgment, and *ex parte*, is not merely voidable, but void. *Coghill's Heirs, vs. Burriss, 57.*
7. A *sciens facias* to revive a judgment in ejectment, may be met and defeated, by a plea, showing that the demise was extended by an *ex parte* order, after the judgment. *Coghill's Heirs, vs. Burriss, 57.*
8. The lessor of the plaintiff in ejectment must have title *at the commencement of the suit*, as well as at the date of the demise. *Redman et al. vs. Sanders, 68.*
9. Service of the declaration and notice in ejectment, is the commencement of the suit. *Redman et al. vs. Sanders, 68.*
10. A descent cast does not bar the right of entry of a *feme covert*, where the disseisin was during coverture, or in her infancy, if she married within age. Yet it does bar the right of the husband, or husband and wife, during his life—after which, it survives and reverts to her. *Neal et al. vs. Robertson et al. 89.*
11. Ejectment may be maintained against a joint tenant by a co-tenant. - *Eades vs. Rucker, 111.*
12. A verdict against a defendant in ejectment not in possession at the institution of the suit, should not be sustained. *Moss et al. vs. Scott, 275.*
See *Possession, 6, 7. Land Titles, 1. Abatement and Revivor, 6.*

ELECTION.

1. A vendee being required to surrender the surplus in the tract of land conveyed, may elect from what side or end it shall be taken. *Harrison vs. Talbot, 268.*
2. *Election* to be disseized. *Blue et al. vs. Sayre, 213.*
3. Election of a Widow to take under the will or not.—See *Dower, 1, 2.*

EMANCIPATION—*in Pennsylvania.*

See *Slaves and Slavery, 3, 6, 8.*

ENCLOSURES—*of Land.*

See *Possession, 15. Forcible Entry and Detainer, 7.*

ENTERTAINMENT.

See *Board.*

ENTRIES.

1. An entry—"beginning at the upper corner, next the river, of J. P.'s entry of 8400 acres, and to run parallel with the river, then off at right angles, eastwardly, for quantity"—the previous entry referred to, being—"J. P. enters &c. about two miles up the first branch above the 18 mile creek, beginning at a tree marked J. P. and to run north &c."—is sufficiently definite, and good on its face. The notoriety of the stream at the date of the entry, being established, and the proof justifying the conclusion that the tree was marked before the entry was made, it is held to be valid. *Cardwell &c. vs. Strother &c. 440.*

ENTRIES—continued.

2. A tree—the beginning corner—being described in an entry as marked with certain letters—the omission of further description, as the species, size or exact position, is not fatal. If the description will enable a subsequent locator to find the object, *by proper enquiry and search*, it is sufficient. Such a description of objects in an entry, as will enable a subsequent locator to go to the place and find them, by the mere directions of entry, without any further assistance or enquiry, is not required. *Cardwell &c. vs. Strother* v. c. 441.
3. Proof that a locator went out, in the fall, to explore land, 20 miles or more from his residence, and upon his return stated, that he had made a location upon land, which he immediately entered in the surveyor's office, with proof that his initials, apparently cut months before, were seen the next spring upon a tree at that place, authorizes the presumption that the tree was thus marked before he made the entry. *Cardwell &c. vs. Strother &c.* 444.

ENTRY, and Right of Entry.

1. A descent cast does not bar the right of entry of a *feme covert*, where the disseisin was during coverture, or in her infancy, if she marries within age. Yet it does bar the right of the husband, or husband and wife during his life—after which, it survives and reverts to her. *Neal et al. vs. Robertson et al.* 89.
2. Question, upon the effect, after discoverture, of the statute, on the rights of the *feme*, under a grant to her during coverture, suggested: not decided. *Neal et al. vs. Robertson et al.* 89.
3. A judgment in ejectment establishes (against the defendants) the plaintiffs right of entry. *Yeates vs. Allin*, 134.
4. The established principles, as to the extent to which a party acquires possession, by making an entry upon land, laid down, and the authorities cited. *Smith's heirs vs. Frost's devisee &c.* 143.

EQUITY.

1. Locators undertook to locate a pre-emption claim—of which the 500 acres in contest was part—for half the land, and made an entry that proved invalid. They also located, for another proprietor, on the same terms, 20,000 acres, surrounding, and (the first entry being bad,) embracing the 500—though they intended to exclude it: it was held that the locators were bound to make good the 500 acres; and, as that might be included in their share of the 20,000, the owners of the 500 should not be required to yield to the title derived from the 20,000 acres entry. 1 *Bibb*, 375. *Smith's heirs vs. Frost's devisee &c.* 144.
2. If the proprietor of the valid entry, in such a case, (*supra*,) could not have justice done him in a division with the locators, without taking the whole, or part, of the invalid entry, (for which the locators were bound,) then he might prevail against the party holding under the invalid entry, for so much as would make up his quantity. *Smith's heirs vs. Frost's devisee &c.* 145. But—

EQUITY—*continued*.

3. Where the bill, brought by the owner of the 20,000 acres, to recover the 500, positively avers that the defendants never held more than the 500, of what the 20,000 included, it must be inferred, in the absence of proof, that the share of the locators is ample to have justice done, without touching the 500. *Ibid*, 146.
4. A bill alleges, and the answer concedes, that a jury in making up a verdict, failed to allow a certain credit—decree for the amount of the credit: but it appearing, by a calculation upon the *data* on which the verdict was made up, that the jury *did* allow the credit—the decree reversed—notwithstanding the concession of the answer. *Pogue vs. Shotwell &c* 283.
5. A party in possession of land, agrees to reconvey a portion, on which there is an interfering claim, to his grantor; who gives his note to pay \$4 an acre, for it—the quantity then unknown. In a suit, by the administrator of the obligee in the note, (who had died in the meantime,) the jury are satisfied, that the interference is 143 acres—verdict and judgment accordingly.—The interference was really *far less*: but the representatives of the decedent (though no parties to the suit at law,) are estopped from showing that fact, in a suit in chancery, for relief against the judgment. They shall reconvey the 143 acres, or so much of it as they hold; and, till they do so, the injunction may be continued; for so much as they cannot restore, and for the rents and profits of the whole, they shall account; and thus far the injunction may be perpetuated. *Pogue vs. Shotwell &c*. 284.
6. After a judgment on a title bond, for a failure to make the conveyance, the obligor cannot, in general, enforce a specific execution of the contract, or obtain any relief in chancery from the judgment at law. But there are exceptions: here, the purchaser knew the state of the vendor's title at the time of the purchase; had received and continued to hold the possession; sustained no injury for want of the legal title; had paid all the purchase money—the last payment enforced by suit; the vendor, before the suit, had apprized the purchaser that he was ready and willing to convey, and, pending the suit, had obtained a complete title, and tendered a deed to the purchaser—who had, until his suit, neither refused the title, nor demanded it, nor evinced any disposition to rescind the contract: held that, under these circumstances, he was bound to take the title, notwithstanding his judgment at law—the injunction on which, is perpetuated, except as to the costs; thus far, it is dissolved, with damages. *Couchman vs. Boyd*, 288.
7. Courts of equity cannot revise judgments at law, to correct unjust or improper verdicts. The remedy, in such a case, is to be sought in the Court of Appeals. The judgment must be deemed right and just until it is reversed. *Cameron vs. Bell &c*. 328.
8. If a specific execution of a contract to convey land is decreed in favor of heirs; and the personal representative *also* recovers damages for the breach in failing to convey—the covenantor may be relieved from the double burden, in equity. *Combs vs. Tarlton's administrators*, 467—9.

EQUITY—continued.

9. Sale of land ; vendee put in possession, under a covenant for the title ;— vendor, from inability, without fraud, fails to make the title ; vendee abandons the possession, brings his action on the covenant, and recovers the purchase money and interest. The vendor is, in equity, entitled to compensation for the use of the land, as a set-off against the interest.—The vendee is accountable for rents and profits, and for waste, during the time he held the possession, and is entitled to an allowance for improvements, viewed as additions to the value of the land when it was abandoned : the balance against the vendee, on an account comprising these items, to be set off against the interest included in his judgment. *Lowry vs. Cox's Executors and heirs*, 469.

See *Attorney*, 2. *Jurisdiction*, 4. *Land Titles*, 4. *Sales of Land*, 9, 10.

ESCHEAT.

See *Aliens*, 1.

ESTOPPEL.

See *Abatement*, 4. *Equity*, 5. *The dissent of the Chief Justice*, in *Hunt &c. vs. Forman*, 473.

EXCESSIVE VERDICT.

See *Practice in Suits at Law*, 20.

EVIDENCE.

See *Inferences and Presumptions* for matters belonging to that class.

1. The deed of land conveyed is the best evidence of the terms of sale, and must prevail (as evidence of the contract) unless there is clear proof of fraud, or of some mistake—such as would never occur without great want of heed in the complaining party. *Brown vs. Parish*, 9.
2. A record offered entire as evidence, when some portions of it only are relevant, must be rejected. *Chiles et al. vs. Conley's Heirs*, 22.
3. A record which cannot be used against parties to a suit on trial, because some of them were not parties to the record, cannot be used for them. *Chiles et al. vs. Conley's Heirs*, 23.
4. An executory contract for land—with 20 years possession, being shown, a jury may, without further proof, presume a legal conveyance. But the nature of the holding in such a case, may be explained, and the presumption rebutted by proof tending to a contrary conclusion. It is a presumption, founded upon law and fact, which a jury may indulge, or reject : not a mere conclusion of law. They should be instructed as to the legal effect of the possession &c. and left to decide upon all the evidence. For the judge to decide absolutely that the legal title has passed, because an executory contract and twenty years possession appear, is erroneous. *Chiles et al. vs. Conley's Heirs*, 24.
5. A statement by a witness of what he understood—not stating from whom he understood it ; as that a tenant entered, *claiming so much land, or under such a title*, “as witness understood”—is too uncertain and indefinite for the foundation of a verdict. *Jones vs. Chiles*, 32.

EVIDENCE—*continued.*

6. Parol evidence is admissible to show that there is a latent ambiguity in a will, upon the face of which there is nothing apparently ambiguous—to explain the ambiguity. *Tudor vs. Terrel et al.* 48.
7. The deed of a large tract of land (sold under the direction of a will) contains a reservation to this effect—"It is also understood that he (testator) may perhaps have disposed of about 800 acres"—"if such shall turn out to be the fact, 800 acres thus conveyed, are excepted." Upon the trial of an ejectment by the grantee against tenants in possession of part of the land, it appears that they had held about 80 acres for a long time, 29 years, claiming it under some contract made with the testator's son, as his agent: from these facts, in the absence of proof, that any other 800 acres had been disposed of by the testator, the jury might infer that the land in controversy constituted the exception in the plaintiff's deed; and their verdict, especially a second one, for defendants, should not be disturbed. *Marshall vs. Goodwin et al.* 58.
8. Where a replevin bond does not purport to have been acknowledged before an officer, evidence is admissible to show that a private person took the acknowledgment.—An obligor is a competent witness to prove that fact, in a trial between the obligee, and an officer charged with a failure to return an execution founded on the bond. *Williams et al. vs. Hall*, 97.
9. Upon a traverse of the finding upon a warrant of forcible detainer, brought by a tenant against his subtenant, evidence is admissible to show, that the plaintiff's term having expired, his lessor (the paramount landlord) had entered, and had leased the land to the defendant—who is, therefore, not bound to restore the land to the plaintiff. *Elms vs. Randall*, 100.
10. Recital of evidence—which, though it does not show that there were not intervals between the periods during which different tenants occupied,—is, yet, held sufficient to authorize a jury to infer, that the party's possession was unbroken for 20 years or more, and sustain the verdict. *Forman et al. vs. Ambler*, 109.
11. The phrase 'the art and mystery of the tanning business,' will include the art of currying, or not, according to the general sense in the place where it is used. In this state, 'the tanning business' is generally understood as the entire process of making leather;—and, therefore, upon the trial here, of an issue, whether a covenant to teach that business, was performed, it is not improper to ask a witness whether the apprentice was a good workman in currying leather. *Barger vs. Caldwell*, 131.
12. If a party indicted for obstructing a road, would defend himself by showing that he was authorized by the county court, to change the course of the road, he must show that he had opened the new road in conformity to the order, before he closed the old one: it is not for the commonwealth to prove that the new road is variant from the order. *The Commonwealth vs. Cornell*, 136.

EVIDENCE—continued.

13. Where one relies upon the fact, that his possession is by actual enclosure, he must prove it—it will not be presumed. *Smith's heirs vs. Frost's devisee &c.* 148.
14. Where an officer levied a *fi. fa.* on the crop of a tenant, and sold it to a stranger;—the landlord afterwards had it taken by distress for rent, sold again, and bought it himself; and the first purchaser sued him for this conversion—it was not error to reject evidence offered on the trial, to show the lien the landlord had on the crop when levied on, notice of it to the purchaser &c. for the purchaser under the *fi. fa.* with, or without, notice of the rent claim, acquired a good title, free of the lien, and the proof was irrelevant. *Craddock vs. Riddlesbarger*, 212.
15. Facts agreed—that a slave was taken from the plaintiff in trover, "at the instance" of the defendants—a husband and wife, who 'about that time received, and continued to hold, possession of the slave, exercising acts of ownership over him.' Defendants offered to prove, that the husband, while his wife was in Kentucky, obtained possession of the slave in S. C. and brought him home: held that this evidence was erroneously rejected,—as it conduced to show, that the conversion was by the husband alone, and also tended to illustrate the agreed case. *Estill and wife vs. Fort*, 259.
16. A fee bill is not evidence of costs incurred in a particular suit, where it does not specify the suit. *Yantis et al. vs. Burditt et al.* 257.
17. Though a written contract may describe a sale of land, as a sale in gross, according to the technical import of the writing, parol evidence—not necessarily conflicting with the written evidence, may be admitted, to show that the contract was in fact made with reference to the number of acres, as to which the parties were under a gross mistake, when the contract was drawn. *Harrison vs. Talbot*, 267.
18. A complainant cannot have a specific execution of a contract in writing, with a variation or modification, by parol evidence. *Harrison vs. Talbot*, 269.
19. Recital of facts, from which, it is held, a jury might infer the death of an ancestor, and descent cast, before the date of a demise. *Moss et al. vs. Scott*, 273.
20. The answer of a principal debtor, admitting his insolvency, is not evidence of that fact, against a co-defendant—his surety. *Daniel vs. Ballard*, 296.
21. Every penal offence must be proved as laid in the indictment.—A charge, that the defendant set up and kept a faro bank, at which money was bet, lost and won, is not sustained by proof that bank notes were bet, lost and won. *Pryor vs. The Commonwealth*, 298.
22. The Commonwealth, suing for a fine, for keeping a tavern (where no liquor is retailed) without a license, must show that it was kept in a town or city, or within half a mile of one: she must make out the whole case by proof. *The Commonwealth vs. Welch*, 330.
23. Where a link in the chain of title to land, consists of a proceeding in chancery and order or decree for the sale of the land, as the estate of

EVIDENCE—continued.

- heirs—if the record contains no evidence that the parties whose estate was sold, were in fact the heirs, and only heirs, of him who died seized, it is insufficient, and the heirship must be proved by other evidence.—Nothing contained in a record, is evidence against one who was no party to it. *Beckwith vs. Marryman &c.* 373.
24. In actions against husband and wife, the admissions of the wife are not admissible as evidence. *Burgen vs. Tribble and Wife*, 383.
25. Proof that a man sold liquor by retail, which was drunk in the house where it was bought, authorizes the inference that he kept a tippling house. *Barnes vs. The Commonwealth*, 389.
26. Upon the trial of an indictment for keeping a tippling house at a certain time, proof of an offence committed at an after time, is inadmissible. *Barnes vs. The Commonwealth*, 390.
27. Evidence to contradict or explain a deed—as, to show that, though absolute on its face, it was only intended as a mortgage, is not admissible, in a trial at law. That a deed was made for a *fraudulent* purpose—as to screen the land from creditors, may be shown, by parol proof. *Stanton et al. vs. The Commonwealth for Gill*, 398.
28. The fact that money had been made out of the defendant in an execution, after the sheriff had sold his property, and applied the proceeds to the satisfaction of a *junior*, when he ought to have applied them to the elder execution, does not affect the right of the *surety* in the senior execution, who consequently had the debt to pay—against the sheriff, for damages for his illegal proceeding; and evidence of that fact, on the trial of the action of the surety against the sheriff, is irrelevant. Judge Underwood (differing from the majority of the court) is of opinion that the sheriff is only liable to the surety, for so much as the latter had to pay, and could not recover of his principal; and consequently, that evidence to show the ability of the principal to pay something, is admissible, to reduce the recovery, *pro tanto*, and even to nominal damages. *Stanton et al. vs. The Commonwealth for Gill*, 400.
29. It is a general rule that 'where general character, or behavior is put in issue, evidence of particular facts may be admitted;—but not where it comes in collaterally.' *The Commonwealth vs. Moore*, 402.
30. Upon the trial of one indicted as a common gambler, evidence that "he was and is by reputation a common gambler," is not admissible: his acts, not his character, are to be proved. *The Commonwealth vs. Hopkins*, 418.
31. Evidence of a single instance of unlawful gaming, may go to the jury, upon the trial of one indicted as a common gambler, and, with other circumstances, e. g. that he displayed gaming implements &c., might warrant a conviction:—while proof of many instances of playing, accompanied with evidence that the accused pursued a lawful calling, and only played for pastime, might not. *The Com'th vs. Hopkins*, 419.
32. The facts which may be given in evidence against one indicted as a common gambler, are not merely those perpetrated within the county where the bill is found; it may be shown, that he had kept a *salero*

EVIDENCE—continued.

bank or gaming table, or otherwise been guilty of unlawful gaming, in other counties. *The Commonwealth vs. Hopkins*, 430.

33. An action for prosecuting a malicious suit, is not sustained by mere proof, that the plaintiff in the suit complained of, was defeated: the malice and want of probable cause, must also be shown. The defendant, of course, may introduce evidence, conducing to show, that there was no malice, and that there was probable cause. *Campbell vs. Threlkeld*, 425.

34. If a deposition is contradictory of any other previous deposition of the same witness, it destroys his credibility; but if the former deposition will admit of a construction not inconsistent with the latter, and the witness is supported by the testimony of others, his deposition will have its influence. *Cardwell &c. vs. Strother &c.* 444.

See *Bills of Exchange*, 6. *Contracts*, 1. *Equity*, 2, 3. *Fraud*, 4.

EXECUTIONS.

1. An equitable interest in land, is not subject to execution: nor was land adversely held, until 1827. *Adams' Heirs vs. Russell & Keiser*, 140.
2. If land be sold under execution, to which the defendant had only an equitable title, or some other claim not subject to the levy, the sale may be quashed upon his motion. But after his death, if his heirs attempt to quash the sale, his personal representative is a necessary party to the motion—without whom, as plaintiff, or defendant, the motion may be dismissed without prejudice. *Adams' Heirs vs. Russell & Keiser*, 140.
3. One work beast &c. of a *bona fide* housekeeper, with a family, is exempt from execution. (See *Pleas and Pleading*, 4.) *Faulkner vs. Bradley*, 141.
4. An unauthorized endorsement on an execution, that it is for the benefit of a third party, is no reason for quashing it, especially after it has been collected. But the endorsement should be quashed or annulled. *McGowan vs. Hoy*, 347.
5. The levy of a junior execution upon the property of a *stranger*, is no injury to the plaintiff, or to the surety of the defendant, in an elder execution, for which they can make the officer liable; the parties to the elder, must show that the property sold was liable to it, to sustain an action against an officer for misapplying the proceeds. *Staton et al. vs. The Commonwealth, for Gill*, 397.
6. An officer who, with a *senior* and *junior* execution, in his hands, levies the *latter* first, in consequence of which, the former is satisfied by a sale of the property of a *surety*, is liable to the surety, for damages, to the full value of the surety's property sold: unless the defendant's effects were insufficient to satisfy the senior execution; then the officer is only liable for so much of the surety's property as sold for the sum the effects of the principal brought: not for what was required to make up the deficiency—the loss, by sacrifice, if any, being thus cast upon the officer. [Judge Underwood thinks the measure of damages against the officer, is the proceeds of as much of the surety's property as was

EXECUTIONS—continued.

wrongfully sold, without regard to actual value and sacrifice. *Staton et al. vs. The Commonwealth, for Gill*, 399.

See *Service of Process*, 12, 13.

EXECUTORS AND ADMINISTRATORS.

1. The pendency of a prior suit is no bar to a recovery against an administrator or or heirs. But the administrator or heirs may, in either suit, confess the action to the amount of the assets, and then plead that judgment in bar of the other action. *Wells vs. Bowking's Heirs*, 42.
2. Land devised to be sold, may be sold by the *acting executors*, where no one is appointed by the will to make the sale, or the nominee refuses to act, or dies before the sale. *Statute of 1797, section 44. Muldrow's Heirs vs. Fox's Heirs &c.* 77.
3. The act of 1797 comprehends cases, where executors are directed to sell land, and some of them do not accept the trust; and authorizes the sale by those who act. *Muldrow's Heirs vs. Fox's Heirs &c.* 76.
4. A power given to a plurality of persons cannot be exercised by a *part* of them; and this rule, the common law, before the 21 of Henry VIII., applied to *executors*, when, to them, *by their proper names*, a mere power was given to them *as individuals*, and not as executors. *Muldrow's Heirs vs. Fox's Executors &c.* 78.—But
5. Where the power is conferred upon executors, merely as such; or where it is coupled with an interest, or with an express trust consequent upon the primary power, (though given to the executors *nominatim*,) it is to be understood as conferred upon them in their fiduciary character, collectively; and it survives as long as more than one remains;—but not to a single one. *Ibid*, 79.
6. Refusal of an executor to undertake a trust, may be presumed from lapse of time and other facts. *Muldrow's heirs vs. Fox's heirs &c.* 79.
7. Where there is a *naked* power given to executors to sell land, it does not, at common law, survive to one:—*aliter*, when the power is coupled with an interest. Where it depends upon the discretion of the nominees, whether there shall be a sale or not, the statute of 1799 does not apply. *Muldrow's heirs vs. Fox's heirs &c.* 80.
8. If there is a positive direction in a will that land shall be sold, its being coupled with a direction that the executors shall “lay out the proceeds to the best advantage for the children,” does not change it, or render *the sale* discretionary with the executors: though part of them who accept the trust may make the sale, while the concurrence of all might be required to distribute the proceeds. *Muldrow's heirs vs. Fox's heirs &c.* 81.
9. The style and tenor of the whole will should be attended to, in deciding upon the power of the executors under a particular clause. *Muldrow's heirs vs. Fox's heirs*, 82.
10. The representatives of a deceased drawer or endorser of a bill of exchange, cannot be joined with the survivors. *Tilford et al. vs. The Bank of Kentucky*, 114.

EXECUTORS AND ADMINISTRATORS—continued.

11. Nor does the third section of the act of 1798—which gives to *protested* foreign bills the dignity of judgments, and requires executors and administrators to suffer judgment to pass upon such bills, before any bond, bill or other debt of equal or inferior dignity—apply to notes discounted by the Bank of Kentucky. An executor or administrator may pay other bonds or notes, in preference to those discounted by the bank, without being guilty of a *devastavit*. *Ibid*, 114. [Judge Nicholas of a different opinion, 121.]
12. If land be sold under execution, to which the defendant had only an equitable title, or some other claim not subject to the levy, the sale may be quashed upon his motion. But after his death, if his heirs attempt to quash the sale, his personal representative is a necessary party.—*Adams' heirs vs. Rossell and Keiser*, 140.
13. If one sells land—the title to be made on payment of the purchase money, and dies, the right to the money passes to his personal representative, who may compel the heir to make the title, to enable him to recover it; and he is a necessary party to a bill for a specific execution, as the decree will require the money to be paid to him. The money, in his hands, is subject to the payment of debts and to distribution, like other personalty. *Muldrow's executors &c. vs. Muldrow's heirs &c.* 386.
14. When the legal title to land, sold by executory contract, has descended to the vendor's heir, who, as such, is entitled to the purchase money, through the executor of his ancestor, and he (the heir,) dies, the legal title passes to his heir, and the right to the unpaid purchase money to his personal representative. *Muldrow's executors &c. vs. Muldrow's heirs &c.* 386.
15. A writing binding the obligor to convey land, is a covenant *real*; which, if not broken in the life time of the covenantee, goes to his heirs; if broken in his life time, it goes to his personal representative, who is entitled to the damages for the breach. And though the covenantee, in his life time, and after the breach, may have sought a specific execution, by bill in chancery, and his heirs may have revived the suit, and obtained the decree, *without making the personal representative a party*—he will be bound by it; his right to the damages is not destroyed, nor his action barred by such decree. There may be a decree in favor of the heirs for a specific execution, saving the rights of creditors; but the personal representative is an indispensable party—his right, not affected where he is omitted. *Combs vs. Tarlton's Administrators*, 465.

See *Assets*, 2. *Limitations*, 4. *New Trials*, 5. *Parties to Suits in Chancery*, 4. *Restitution*, 1. *Vendor and Vendee*, 4. *Wills*, 10.

FEEES—of Attorneys.

See *Attorneys*, 1.

FEME COVERT.

1. The revenue law of 1799, under which land was sold for taxes, saved the rights of *femes coverts*—a sale of land in which any *feme covert*

FEME COVERT—*continued.*

was a joint owner was invalid, and the register's deed passed no title. *Harris vs. Smith*, 12.

2. A *feme covert* is not legally liable for consenting to, or advising, a wrong: she cannot be a trespasser by construction. *Estill and Wife vs. Fort*, 240.

See *Wills*, 7, 8, 9, 10.

FORCIBLE ENTRY AND DETAINER.

1. The service of a warrant of forcible entry and detainer must be by notice to each defendant in person: constructive notice—as by copy left &c. is insufficient. *Lewis et al. vs. Outten*, 92.
2. Written notice left at the "supposed most common place for him (defendant) to be found," is not a good constructive service. *Lewis et al. vs. Outten*, 93.
3. After the expiration of the term, the landlord may have a warrant of forcible detainer against any one in possession; or he may make a peaceable entry, and having done so, may lease the land to the subtenant, who will thereby be excused from restoring the possession to his first lessor; unless he was bound to do so by express covenant—for breach of which an action is the only remedy. *Elms vs. Randall*, 100.
4. Upon a traverse of the finding upon a warrant of forcible detainer, brought by a tenant against his subtenant, evidence is admissible to show, that the plaintiff's term having expired, his lessor (the paramount landlord) had entered, and had leased the land to the defendant—who is, therefore, not bound to restore the land to the plaintiff. *Elms vs. Randall*, 100.
5. Ejectment may be maintained against a joint tenant by a co-tenant—and so may a warrant of forcible entry and detainer, when there has been a disseizin by actual force. The warrant, in such case, may be in the usual form—the judgment must be for the undivided interest. A warrant for a forcible entry and detainer will lie only against a party in possession at its date—not against one who does not in fact hold the land. *Eads vs. Rucker*, 111.
6. If a party holding a tract of land, acquires title *by deed* to an adjoining tract, his possession is presumed to be extended to the limits of his new purchase. *4th Mon.* 442. So also, although his new purchase was by an executory, parol contract, if he entered upon it, under the authority of the vendor, his possession will be held to include it, and he may maintain a writ of forcible entry and detainer, against an intruder. *Boyce vs. Blake et al.* 127.
7. No improvement, or enclosure, is necessary to enable a plaintiff to maintain a writ of forcible entry and detainer. *Boyce vs. Blake et al.* 129.
8. A party who was put into possession of land by the execution of a *habere facias*, can not be dispossessed, by warrant of forcible entry. *Yeates vs. Allin*, 134.
9. A possession, by the mere occupancy of a tenant who disclaims holding of him under whom he entered, and, without his landlord's consent, attorns to a stranger, is of no avail to the stranger; and if the landlord,

FORCIBLE ENTRY AND DETAINER—*continued.*

after the departure of the tenant, resumes the possession, it is no forcible entry upon the land of him to whom the tenant thus unlawfully attorned. *Blue et al. vs. Sayre*, 214.

10. Wherever the ancestor could have had a writ of forcible entry and detainer, the *heirs* have the same remedy. *Yoder's Heirs vs. Easley*, 245.
11. The remedy by writ of forcible entry and detainer, is given "to him only who, at the time of the entry, had possession in fact." If a tenant, or subtenant, is disseized, *he*, and not the landlord, has this remedy. The landlord must look to his immediate tenant, with his contract for a restoration of the possession, for redress. *Yoder's Heirs vs. Easley*, 245.

See *Possession*, 7. *Trespass*, 1.

FRAUD.

1. A man makes a bill of sale to his brother, in secret, of all his slaves, and dies, leaving a will in which he provides for his widow. She thinks of renouncing the provision and taking the dower allowed by law, and consults the brother on the subject. He, nevertheless, conceals from her the fact, that the slaves had been conveyed to him, until she has made an election not to take under the will:—held that the concealment was a fraud upon the widow—in consequence of which she shall be allowed her dower in the slaves, the secret conveyance in the husband's life time notwithstanding. *Morrison vs. Morrison's Widow*, 14.
2. One who has a claim to property, and stands by and sees another negotiating for the purchase of it, and remains silent; or who being consulted about his title or claim to property, or about the policy of a purchase contemplated by another, is bound to disclose his right, title or claim to the property in question; and if he disclaims, or remains silent, he is guilty of fraud upon the party contemplating the purchase,—and shall be postponed in his favor. *Morrison vs. Morrison's Widow*, 15.
3. A man takes a secret conveyance of slaves, and permits them to continue upon the farm of the grantor until after his death, and until his widow, ignorant of the conveyance, and believing that the slaves constitute part of the estate of which she may be endowed, renounces the provision made for her by the will: permitting the slaves to remain on the farm, whereby the widow was deceived as to the amount of estate left by her husband, is a fraud upon her, affecting the grantee's right, against which, she shall be allowed her dower in the slaves. *Morrison vs. Morrison's Widow*, 18.
4. Possession by a mortgagor is not *per se* fraudulent; nor is it, in general, any evidence of fraud in fact. *Snyder vs. Hitt*, 204.
5. A grantor may make a deed with an intent to defraud creditors: yet, if it is made upon a fair *bona fide* consideration, to one who had no participation in, or knowledge of, the grantor's fraudulent intent, it will be good and valid. *Violett vs. Violett*, 324.
6. Judgment, on a note, is confessed in a county where neither party resides; defendant agrees that execution may be issued *forthwith*, and

FRAUD—continued.

be levied on a certain boat, and that she may be sold without advertisement: upon these, and various other facts and circumstances recounted in the text, it is held, that the note was the result of a combination to defraud another owner of the boat, and that the plaintiff in the judgment is not to be considered as a *bona fide* creditor. *Thoms vs. Southard, & c converso*, 478.

See *Bills of Exchange*, 6. *Conveyances*, 11. *Pleas and Pleading*, 6, 12.

GAMING.

1. Money, or property, bet on any game or hazard, and so forfeited by the act of '99, can be recovered, *only* by a *qui tam* action. *Hickman vs. Littlepage*, 344.
2. Money, or other thing, bet on an election, is forfeited, and may be recovered in the name of the Commonwealth alone, or by a *qui tam* action. Act of 1828, § 5. *Hickman vs. Littlepage*, 344.
3. The stake holder of money bet on any game, sport or pastime, is bound to restore it, upon notice; and on failure so to do, is liable to the action of the party aggrieved. *Hickman vs. Littlepage*, 345.
4. The clause of the act of '33, that requires the stake holders of money bet on any game, sport or pastime, to return it to the betters, does not apply to bets made upon elections, and forfeited by the act of '28. Money bet on the event of an election, cannot be recovered from the stake holder, by suit in the name, and for the sole use, of the party aggrieved.—The mode of recovery, under the act of '28, is by action *qui tam*, or in the name of the Commonwealth. *Hickman vs. Littlepage*, 346.
5. A defendant indicted as a common gambler, is not entitled to a bill of particulars, or specification of acts intended to be proved against him. *The Commonwealth vs. Moore*, 402.

See *Bill of Exchange*, 6. *Bill of Particulars*, 2, 3. *Evidence*, 30, 31, 33.

GARNISHEE.

See *Choses in Action* and *Equitable Interests*, 3.

GIFT.

1. A party holding a slave which belongs to another, gives it away, but retains the possession until his death, which occurs before the right of the true owner is barred by lapse of time; upon which, his administrator delivers the slave, as distributable estate, to one of the distributees; who retains the possession until time has barred the right of the true owner: the donee cannot recover it of the distributee, for as the donor never had any title, the donee acquired none by the gift; and the statute of limitations, operates in favor of the party in possession. *Pate vs. Barrett and Wife*, 427.
2. Where one sells real estate, with warranty, the heir, to whom sufficient assets descended, is estopped to deny the right of his ancestor to convey, because of the *warranty*. But this principle does not apply to a parol gift of a chattel, for there the law does not imply any warranty. *Pate vs. Barrett and Wife*, 427.

GRANTS.

See *Land Titles*, 2.

GUARDIAN AND WARD.

1. Wards are not bound to take bank stock, in which their guardian invested their funds, and which afterwards sunk in value. He must account to them for the money invested, with interest. 7 J. J. M. 238. *Hughes &c. vs. Smith*, 251.
2. Guardians are required to settle their accounts annually; and to keep their wards' money out at interest, upon security approved by the county court—the interest to be collected, and added to the principal, annually. For failing to comply with these requisitions, they are liable.—But if a guardian cannot let the money, or cannot collect the interest, he will be excused; and held accountable for interest so far only as he receives it.—If he uses the money himself, he will be held accountable for the *compound interest*. *Hughes &c. vs. Smith*, 251.
3. A guardian who invested funds of his wards in bank stock, in good faith, for their benefit, and received the dividends in depreciated paper, was held accountable for their money, with interest—to his loss. Under these circumstances, the interest shall not be compounded upon him. *Hughes &c. vs. Smith*, 252.
4. A guardian may be allowed, for his services, 5 per cent. on the amount he pays over to the wards. *Hughes &c. vs. Smith*, 253.

HABERE FACIAS.

1. When a writ of *habere facias* is executed, the judgment is satisfied: any subsequent *habere facias* on the same judgment, is illegal, and may be quashed. *Fowler vs. Currie et al.* 52.
2. If the plaintiff in a *habere facias* is disturbed, after being put into possession, his remedy is by a writ of forcible entry, or ejectment. *Fowler vs. Currie et al.* 52.

HEIRS AND DEVISEES.

1. Slaves—though they descend and pass as real estate, (by statute,) do not vest in the heirs, without the assent of the personal representative; in whose hands they are (by the same statute) assets, and in whose hands alone they can be reached by creditors. *Wells vs. Bowling's Heirs*, 42.
2. The property of heirs in slaves inherited, does not render *them* liable to any judgment upon the obligation of the ancestor. When there is neither executor nor administrator, the title to the slaves—like the title to the personal property—rests in abeyance. The act authorizing suits against heirs alone, after twelve months elapsed without the appointment of executor or administrator, does not subject any property in their hands which was not so liable before the statute. *Wells vs. Bowling's Heirs*, 43.
3. Former decisions of this court, (6 Mon. 124—7 Mon. 421,) that there could be no judgment *quando* against heirs, questioned and overruled; and now held, that—Though the right and title of the heir is cast upon him at once by the death of the ancestor, he may not acquire, or be

HEIRS AND DEVISEES—*continued.*

able to obtain, *the possession* until long afterwards; and is liable to the creditors of the ancestor so far only as estate has actually come to his possession. In the mean time, the creditor should have the right to establish his debt, by suit against the heir, and to have his judgment satisfied out of any estate of the ancestor which the heir may thereafter acquire possession of. Judgments against *heirs*, for assets *quando*, are therefore legitimate, necessary and proper. *Wells vs. Bowling's Heirs*, 45.

4. Wherever the ancestor was entitled to a writ of forcible entry and detainer, the *heirs* have the same remedy. *Yoder's Heirs vs. Easley*, 245.
5. The liability of Heirs for restitution of money collected by virtue of an erroneous decree, after reversal. See *Restitution*, 1.
See *Assignment*, 2. *Executors and Administrators*, 1, 13, 15. *Limitations*, 4. *Parties to Suits in Chancery*, 4. *Vendor and Vendee*, 4.—*Wills*, 2.

HUSBAND AND WIFE.

1. Actions, upon the title of *husband and wife*, to lands granted to her during coverture, are barred by the statute of 1809, for the speedy adjustment of land claims—"the seven years law." *Neal et al. vs. Robertson et al.* 87.
2. A descent cast does not bar the right of entry of a *feme covert*, where the disseizin was during coverture, or in her infancy, if she married within age. Yet it does bar the right of the husband, or husband and wife, during his life—after which, it survives and reverts to her. *Neal et al. vs. Robertson et al.* 89.
3. Husband and wife may be jointly guilty of a tort, trespass, or tortious conversion of a chattel. *Estill and Wife vs. Fort*, 238.
4. A conversion by a wife, is a conversion to the husband's use: and he only can be sued for it. Where the conversion was by both jointly, he alone, or both jointly, may be sued. If they are joined, the declaration must allege that the conversion was (not to *their*, but) to *his* use. *Estill and Wife vs. Fort*, 238.
5. A count, in trover, charging a conversion by husband and wife, to his use, and one charging a conversion by the wife alone, may well be joined.—*Estill and Wife vs. Fort*, 239.
6. The husband is bound to maintain his wife; and if he drives her off, or so treats her as to justify her leaving him, it entitles her to credit for necessities. But for *board*, when he who received the wife, had not declared his intention to claim it, (1 Dig. 465) there is no liability.—*Henderson vs. Stringer*, 292
7. The husband's assent, to his wife's contracts for necessities for herself and family, is implied during cohabitation. Not so, when she has eloped without sufficient cause. But if he receives her again, after a separation, or if she desires to return, and he, without sufficient cause, refuses to receive her, his assent to her contracts for necessities, thenceforward, will be inferred. *Henderson vs. Stringer*. 292.

HUSBAND AND WIFE—continued.

8. In actions against husband and wife, the admissions of the wife are not evidence: they do not bind the husband. *Burgen vs. Tribble and Wife*, 333.
9. A court of equity will not aid a husband in reducing the chattels and choses in action of the wife to possession, nor subject *them* to the satisfaction of *his* debts (upon his creditor's bill against him and his wife, for that object)—without a suitable provision being made, out of the property, for the support of the wife, if she desires it, and her condition is such as to require it; and if the whole is necessary for that object, no part will be put at the disposal of the husband, or within the reach of his creditors. *Bennett et ux. vs. Dillingham*, 437.
10. Property of the wife, which, under an order in the suit of a husband and wife, for distribution, has been converted into money in the hands of a commissioner, or administrator, is still not reduced to possession by the husband: were he to die, she alone would be entitled to it: it cannot be reached by his creditors, without a provision for her. *Bennett et ux. vs. Dillingham*, 438.

See *Wills*, 9, 10.

IMPROVEMENTS ON LAND.

1. If the purchaser of land, whose contract is rescinded, has made valuable and lasting improvements on the land; or if it has suffered in his hands through neglect or mismanagement—these things are the subjects of valuation, account, and final settlement by the decree. *Williams vs. Rogers*, 375.
2. The amount to be allowed for improvements, to one who has *had the use* of them for a time, is their value when he surrenders them, not their value at the time they were made. *Williams vs. Rogers*, 376.

See *Partition of Land*, 3. *Covenant*, 3.

INDICTMENT.

1. For misdemeanors of the same kind, differing only in the degree of guilt, and of punishment, one indictment charging divers offenders *severally*, may be maintained. *The Commonwealth vs. McChord et al.* 243.
2. The strictness of old times, is not now required in indictments for misdemeanors and minor offences. The omission of terms merely technical is not material. *The Commonwealth vs. McChord et al.* 243.
3. A judgment acquitting several defendants, charged with committing an offence jointly, will not bar prosecutions against each one charged with part of the same offence separately committed by him. *The Commonwealth vs. McChord et al.* 243.
4. An indictment for a misdemeanor, describing an offence at common law, but not within any statute, may be maintained, notwithstanding it concludes "against the statute in such cases made and provided;" as that may be rejected, as surplusage. *Gregory vs. The Commonwealth*, 417.
5. The Court of Appeals has no jurisdiction of any criminal or penal case in which imprisonment may be imposed. An indictment for obstructing a highway, at common law, is such a case. *Gregory vs. The Commonwealth*, 417.

See *Joint and several undertakings and liabilities*, 3, 4, 5, 7. *Evidence*, 21.

INFANTS AND INFANCY.

1. The act of limitations, barring the right to recover a slave after an adverse holding for five years, saves the rights of infants for five years after they attain to full age. *Merrill vs. Tevis*, 164.
2. The authority of the courts of chancery to decree the sale of the real estate of infants, extends only to estates descended to them. *Coger vs. Coger*, 270.
See *Contracts*, 3.

INFERENCES AND PRESUMPTIONS.

1. If a testator devised land to be sold, to educate his children, it may be thence inferred, that he intended the sale should be made during their minority. *Mulckow's Heirs vs. Fox's Heirs &c.* 84.
2. Where one party delivers to another, depreciated bank notes, and takes an obligation for their nominal amount, payable in specie, at a future day, with interest—the transaction, nothing else appearing, must be taken to be a usurious lending. *Warfield's Administrators vs. Boswell &c.* 225.
3. Statement of evidence tending to fortify that presumption. *Ibid*, 226.
4. The limited extent of a county,—of which the court takes notice,—repels a presumption that an allowance was made, by the court below, to a party summoned within it, for travel. *Warner vs. Smith and Hart*, 424.
5. Proof that a locator went out, in the fall, to explore land, twenty miles or more from his residence, and upon his return, stated, that he had made a location upon land, which he immediately entered in the surveyor's office, with proof, that his initials, apparently cut months before, were seen the next spring, upon a tree at that place, authorizes the presumption that the tree was thus marked before he made the entry. *Caldwell &c. vs. Strother &c.* 444.

See *Possession—of Slaves*, 3. *Evidence*, 19.

INJUNCTIONS.

1. A purchaser, by executed contract,—under peculiar circumstances (described in the text) may be allowed an injunction to stop the collection of the purchase money, without showing any fraud, or any eviction.—*Taylor vs. Lyon*, 279.
2. A vendee who can avail himself of an adverse possession of twenty years, is not entitled to an injunction upon a judgment for the purchase money. *Taylor vs. Lyon*, 280.

See *Choses in Action and Equitable Interests*, 3. *Equity*, 5. *Rescission of Contract*, 3.

INSTRUCTIONS.

1. Instructions, that “if the jury believed that T. M. and those claiming under him were in possession of the land in controversy more than twenty years, before they were divested” &c. held to be erroneous—because not sufficiently explicit, (as “the possession” must have been adverse and continual,) and may have misled the jury. *Forman et al. vs. Ambler*, 110.

INSTRUCTIONS—continued.

2. Whether a *nuisance* is a public or private one—whether, if private, it injured the defendant, are questions for a jury—instructions which, disregarding these distinctions, tell the jury that “if the dam was a nuisance, the defendant had a right to abate it”—are erroneous. *Gates vs. Blincoe et al.* 158.
3. If a judge, while instructing or addressing a jury, uses language calculated to induce them to believe, that it is their duty to decide a fact submitted to them, one way or another, by telling them, that “it is the plainest case he ever saw in court”—“that the note *was proved* to have been altered” or the like—the jury being the triers of the facts, the evidence of which they are to weigh—he commits an error, for which the judgment may be reversed. *Allen vs. Kopman*, 221.
4. Instructions held erroneous upon an agreed case for the conversion of a slave, charged to have been committed by a husband and wife jointly, and also, in a second count, by the husband alone. *Estill and Wife vs. Fort*, 240.
5. Erroneous instructions are cause for reversal, notwithstanding the verdict may be such as it ought to have been, under a correct exposition of the law. *Davis vs. Young*, 310.

INTEREST.

1. The interest given by the act of 1830, regulating the action of replevin, is to be computed from the time when the writ of replevin was *executed*, not from its date. *Yantis et al. vs. Burditt et al.* 256.
2. When a contract for the sale of land, which the purchaser paid for, and was put in possession of, is rescinded, for causes free of fraud, the use of the money, and the use of the land, are held to balance each other: the decree should, in general, restore the money to the purchaser without interest; the land to the vendor, without rents or profits. *Williams vs. Rogers*, 375. See *Rescission of Contract*, 6.
3. If a balance of purchase money remains unpaid when a contract for the sale of land of which the purchaser has had the use, is rescinded, the vendor is entitled to interest on it, in lieu of rent. *Williams vs. Rogers* 376.
4. Where an obligor is at liberty to withhold payment, until some act is performed by the payee, of which the obligor is entitled to notice, interest is recoverable only from the time when the notice was given.—*Hodges vs. Holeman*, 396.

See *Guardian and Ward*, 2, 3. *Replevin*, 2. *Damages*, 3. *Set-Off*, 3.

JOINDER—of different causes of action.

See *Pleas and Pleading*, 9.

JOINDER—of Parties.

See *Abatement*, 1. *Practice in Chancery*, 3. *And the two next titles.*

JOINT AND SEVERAL RIGHTS.

See *Release*, 2. *Pleas and Pleading*, 14.

JOINT AND SEVERAL UNDERTAKINGS AND LIABILITIES.

1. The representatives of a deceased drawer or endorser, can not be joined in the same suit with the surviving drawers or endorsers. *Tilford et al. vs. Bank of Kentucky*, 114.
2. A conversion by a wife, is a conversion to the husband's use: and he only can be sued for it. When the conversion was by both jointly, he alone, or both jointly, may be sued. If they are joined, the declaration must allege, that the conversion was (not to *their*, but) to his use. *Estill and Wife vs. Fort*, 238.
3. Different persons guilty of a joint offence, may be indicted jointly, or severally. *The Commonwealth vs. McChord et al.* 243.
4. A joint indictment against several, for distinct offences, will not lie. *The Commonwealth vs. McChord et al.* 243.
5. If one can be indicted alone, for an offence in which he participated with others, the offence is the joint act of all: otherwise it is several. *The Commonwealth vs. McChord et al.* 243.
6. For misdemeanors of the same kind, differing only in the degree of guilt, and of punishment, one indictment charging divers offenders *severally*, may be maintained. *The Commonwealth vs. McChord et al.* 243.
7. A judgment acquitting several defendants, charged with committing an offence jointly, will not bar prosecutions against each one charged with part of the same offence separately committed by him. *The Commonwealth vs. McChord et al.* 243.

JOINT TENANTS, AND JOINT OWNERS.

See *Forcible Entry and Detainer*, 5. *Lien*, 7. *Steam Boat*, 1, 2.

JUDGMENTS.

See *Bar by former decision*, 2. *Fraud*, 6. *Jurisdiction*, 5. *New Trial*, 2.

JURIES AND JURORS.

1. The right of peremptory challenge, in penal cases (not felonies) extends to three jurors, as in cases strictly civil. 3 J. J. M. 149. *Pryor vs. The Commonwealth*, 298.
2. Questions to be decided by a Jury—See *Assumpsit*, 3. *Practice in Suits at Law*, 1, 2, 8.

JURISDICTION.

1. A party not in possession cannot maintain an original bill to quiet his title, or compel the relinquishment of an adverse claim. But where one in possession brings his bill against those from whom he derives title, and makes others also, from whose claims he apprehends danger, defendants—requiring them to interplead with his vendors—the chancellor will take jurisdiction as between these defendants, and settle the whole controversy; and the jurisdiction, having once attached, will not be taken away by the dismissal of the original bill; a decree upon any remaining cross bill, will be effectual. *Harris vs. Smith &c.* 11.
2. The authority of the courts of chancery to decree the sale of the real estate of infants, extends only to estates *descended* to them. *Coger vs. Coger*, 270.

JURISDICTION—*continued*.

3. Where a special jurisdiction is given by statute, *the record* must show a case within the statute; otherwise, a defect of jurisdiction will be presumed. *Coger vs. Coger*, 270.
4. Chancery cannot relieve against a judgment, upon the ground that the verdict was rendered excessive by erroneous deductions of the jury, from the evidence: a new trial at law, is the only remedy. *Pogue vs. Shotwell &c.* 284.
5. Courts of equity cannot revise judgments at law, to correct unjust or improper verdicts. The remedy, in such a case, is to be sought in the Court of Appeals. The judgment must be deemed right and just until it is reversed. *Cameron vs. Bell &c.* 329.
6. To authorize a proceeding in a county court, for the partition of estate descended, among the heirs, it must appear, that the land, being within the county, is within the jurisdiction of the court. *Palmer vs. Palmer and Others*, 390.
7. The Court of Appeals has no jurisdiction of any criminal or penal case in which imprisonment may be imposed. An indictment for obstructing a highway, at common law, is such a case. A writ of error in a cause where the Court of Appeals has no jurisdiction, will be quashed. *Gregory vs. The Commonwealth*, 417.
8. Case in which there is an allegation, that part of the land in controversy lies within the conventional limits of Tennessee, but that, not being admitted, or proved, the question of jurisdiction &c. which might arise, under the peculiar circumstances of the case, are merely suggested—not decided. A court in Kentucky, could not partition the land in Tennessee, but would probably allot to the complainant his whole share out of the land within this state, unless the parties could agree upon a division. *Cates &c. vs. Woodson*, 457.
9. The courts of the United States have an exclusive maritime jurisdiction, extending as far as the tide ebbs and flows. Those who furnish supplies &c. for vessels in foreign ports, or in a state where the owners do not reside, have liens on the vessels, which they may enforce in a court of maritime jurisdiction, and the decree binds all parties interested.—*Thoms vs. Southard, & e converso*, 481.
10. A steam boat, having been libelled in a federal court, having maritime jurisdiction, in another state, and that court having directed a sale of the boat, and distributed the proceeds among various persons who became parties, and established claims for which the boat was liable; and having made a final decree, settling the respective rights of the owners, claimants, and mortgagees, of the boat: and the decree being pleaded in a suit in this state, this court presumes—nothing appearing to the contrary—that that court had jurisdiction *in rem*, and of all the matters embraced by the decree; and holds it conclusive, and final, notwithstanding the suit here was previously commenced upon some of the same claims. *Thoms vs. Southard, & e converso*, 482, 484.
11. The appearance and answers of the parties will enable a court of maritime jurisdiction to proceed upon contracts relating to a vessel, though

JURISDICTION—continued.

the claims are not such as to give jurisdiction *in rem*. *Thoms vs. Southard, & e converso*, 488.

12. A party who has instituted a suit to subject a vessel or boat, to sale, to satisfy demands to which she is, or can be made, liable, cannot translate the litigation, by sending her to a foreign port, and there libelling her himself. But, as part owner, he may send her, in her accustomed trade, to a foreign port; and if she is there libelled by another party, who may legally subject her to sale, the former may intervene, and claim his share of the proceeds; and—to prevent them from being distributed entirely to others—may bring in *all his claims* upon the vessel or boat, and thus, in effect, transfer the jurisdiction, rendering his first suit nugatory, and subject to dismissal. *Thoms vs. Southard, & e converso*, 484.

See *Practice in Chancery*, 5, 10, 28. *Powers*, 4.

LANDLORD AND TENANT.

1. Neither tenant nor sub-tenant can legally attorn to any claimant of the land but the lessor under whom he entered. *Edwards vs. Randall*, 100.
But—
2. After the expiration of the term, the landlord may have a warrant of forcible detainer against any one in possession; or he may make a peaceable entry, and having done so, may lease the land to the sub-tenant—who will thereby be excused from restoring the possession to his first lessor; unless he was bound to do so by express covenant—for breach of which an action is the only remedy. *Ibid*, 100.
3. A tenant may sell his goods and chattels during his term, by sale absolute, or by mortgage; and they will not thereafter be liable to the landlord's distress, although they remain upon the demised premises. *Snyder vs. Hitt*, 204.
4. Case of the sale of a field of growing corn—first under a *fiere facias*, then under the landlord's distress &c. *Craddock vs. Riddlesbarger*, 205.
5. The landlord has a lien on the goods and chattels belonging to his tenant, and found upon the rented land, for one year's rent, or what less may be due; and the officer who levies a *fiere facias* on them, having notice of the landlord's claim, is bound to pay or tender to him (or his agent,) such arrears of rent; and should, thereupon, take and sell enough of the tenant's property to pay both demands. *Craddock vs. Riddlesbarger*, 207.
6. The immediate landlord *only*, has a lien upon the goods &c. of his tenant: it does not extend to a sub-tenant's goods. *Craddock vs. Riddlesbarger*, 209.
7. Where a tenant disclaims holding under the landlord from whom he received the possession, and attorns to a stranger—the attornment being void in law, does not operate as a disseizin of the landlord. He may, however, elect so to consider it, and bring his action for a disseizin.—*Blue et al. vs. Sayre*, 213.

See *Rent*, 12, 13.

LAND TITLES.

1. Where there is a subsisting right of entry, under the elder grant, there can be no recovery by those claiming under the junior grant. *Jones vs. Chiles*, 34.
2. Quit rents and all reservations and conditions in grants of land from the crown of Great Britain were abolished by an act of Virginia of 1777, and of Kentucky of 1796: such grants are not affected by a failure to pay such rents, or comply with such conditions or reservations, *Fry, Vaughan et al. vs. Smith et al.* 38.
3. An estate in land does not pass by *nuncupative* will. *Palmer vs. Palmer and Others*, 390.
4. A *pendente lite* purchaser, and the purchaser of the legal title to an estate, with notice of an outstanding equity, do not stand upon precisely the same footing. *The former* is absolutely concluded by the decision of the pending suit—which might otherwise be rendered nugatory by alienations of the estate; and if the suit be not prosecuted successfully, the purchaser is not affected by it; it does not operate as notice to him. *The latter* acquires the legal title by his purchase, and can only be divested of it, by a suit upon the equity of which he had notice, and a decree against him. *Watson vs. Wilson*, 408.
5. Whether a *lis pendens* purchaser acquires a title that remains with him, notwithstanding the termination of the suit against his right, requiring another suit *against him*, to divest him of the legal title: or whether his title is absolutely void and of no effect, is a question (of no great importance) not known to have been decided. This court incline to the opinion, that such a title is absolutely void. *Watson vs. Wilson*, 409.

See *Aliens*, 1. *Conveyances*, 1. *Diligence*, 1, 2, 3. *Rescission of Contracts*, 3. *Limitations*. *Possession*.

LIBEL—in a court of admiralty.

See *Lien*, 8, 9. *Steam Boat*, 2.

LIBERUM TENEMENTUM.

See *Trespass*, 1.

LICENSE—to Keep Tavern.

See *Taverns*.

LIEN.

1. If the vendor of land holds a note, with an equitable lien, for the purchase money, his assignment of the note carries the equitable lien with it. *Edwards vs. Bohannon*, 98.
2. The immediate landlord *only*, has a lien upon the goods &c. of his tenant: it does not extend to a sub-tenant's goods. *Craddock vs. Riddlesbarger*, 209.
3. The lien for rent is only for the year last preceding the levy. *Craddock vs. Riddlesbarger*, 209.
4. It is a rule of the common law, that goods in the custody of the law, (taken in execution &c.) are not subject to distress for rent; and neither

LIEN—*continued.*

the statute 8 Anne, nor any statute of Kentucky, have essentially changed this rule, though they give a new remedy; requiring the creditor who has a levy made on a *tenant's* goods &c., to pay the landlord his rent in arrear, not exceeding one year; and rendering the officer who, with notice of the landlord's claim, makes such levy, *liable*, if he proceeds to sell, without satisfying the rent claim. So far only does the lien extend; it does not affect the title of the purchaser at the execution sale. The remedy is against the creditor and officer. *Craddock vs. Riddlebarger*, 209.

5. A suit to subject an equitable estate to the satisfaction of a debt, creates a lien upon the estate, commencing with the institution of the suit, and overreaching all subsequent conveyances and levies. *Watson vs. Wilson*, 410.
6. A *bona fide* creditor, holding a mortgage to secure his debt, which is not recorded, but upon which he has instituted a suit, *in rem*, will be preferred to another creditor, or a purchaser, who acquired a lien, or purchased, after the commencement of the mortgagee's suit; for the suit gives a lien independent of the mortgage. The party purchasing, or taking a lien, while the suit is pending, takes it *cum onere*, or subject to the complainant's claim. *Thoms vs. Southard, & e converso*, 480, 481.
7. One, of two owners of a steam boat, files a bill against the other, to prevent him from selling his share, to enforce a mortgage on it, and subject the boat to a reimbursement of his own advances, and the claims of other creditors: he can maintain his suit for this object, and have a final settlement of all transactions connected with the joint ownership; and the *lis pendens* gives the complainant an equitable lien, of which he cannot be divested, by any subsequent levy or sale. *Thoms vs. Southard, & e converso*, 480.
8. The courts of the United States have an exclusive maritime jurisdiction, extending as far as the tide ebbs and flows. Those who furnish supplies &c. for vessels in foreign ports, or in a state where the owners do not reside, have liens on the vessels, which they may enforce in a court of maritime jurisdiction, and the decree binds all parties interested.—*Thoms vs. Southard, & e converso*, 481.
9. Whenever a vessel or boat is libelled, all parties having claims for which she is liable, may intervene, and have decrees for their rightful shares of the proceeds. *Thoms vs. Southard, & e converso*, 483.

See *Rescission of Contracts*, 2.

LIMITATIONS.

1. There is no statute, nor any analogous principle, limiting the time within which judgments may be amended. It may be done at any time while the judgment remains in force. *Roman vs. Caldwell's Heirs*, 20.
2. The possession, to bar an adverse entry, by time, must be continued—uninterrupted: for the law will not allow that time is progressing against a claimant, when he can find no occupant on the land, to bring suit against. *Jones vs. Chiles*, 31.

LIMITATIONS—*continued.*

3. The possession acquired under a *habere facias* upon a judgment in ejectment, has relation back to the commencement of the suit; and the time between that and the execution of the *habere facias* (though the execution has been long delayed by injunction, or otherwise,) cannot be counted to make up twenty years of adverse possession. *Jones vs. Chiles*, 32.
4. Executors being directed to sell land of the testator—the will being silent as to the time within which the sale is to be made—the power—the time for exercising it depending upon reason and conscience—is not lost by mere lapse of time, (seventeen years in this case.) But the heirs or devisees may object, and prevent the sale, after an unreasonable delay.—*Muldrow's Heirs vs. Fox's Heirs &c.* 83.
5. If a decree is made requiring executors to sell land, as directed by the will, the omission to comply for a long time, (six years,) does not invalidate the power. But the testator's intentions must be observed, and if he has limited a time, and that has passed, the power is gone—the chancellor cannot revive it. *Muldrow's Heirs vs. Fox's Heirs &c.* 83.
6. The savings in the second section of the limitation law of 1914, have no application to the seven years law of 1809. *Neal et al. vs. Robertson et al.* 87.
7. Question, upon the effect, after discovery, of the statute, on the rights of the *feme*, under a grant to her during coverture; not decided. *Neal et al. vs. Robertson et al.* 89.
8. F purchases 500 acres, and S 300 acres, of a certain preemption—their purchases independent of each other. They both enter upon, possess and hold their respective purchases; but the entry proves invalid—their titles bad. S, however, had purchased a paramount title, that covers his own and F's land; and files his bill to recover the 500 acres, by virtue of his later acquired title: if F, (or those claiming under him,) has had twenty years possession, or an actual residence on the land for seven years, the statutes of limitations protect him to the extent of his claim. The doctrine, that where two occupy the same land, claiming it under different titles, the law considers that he who has the better title has the exclusive possession, does not apply. *Smith's Heirs vs. Frost's Devisee &c.* 146.
9. The act of limitations, barring the right to recover a slave after an adverse holding for five years, saves the rights of infants for five years after they attain to full age. *Merrill vs. Tevis*, 164.
10. An actual residence upon the land, is indispensable, to ensure to the occupant, the protection of the act of 1809, for the speedy adjustment of land claims—"the seven years law:" so decided, often and invariably. But the precise meaning of the terms "settlement"—"settle," as used in that act—what possessions the former term may include—has never been heretofore determined by this court. *Davis vs. Young*, 300.—Judge Underwood thinks former decisions have defined and fixed the meaning of the terms. §18.

LIMITATIONS—*continued.*

11. Review of various cases, upon the seven years' law, with reference to the question, whether the act applies when the *dwelling house* of the settler is not upon the part of the land adversely claimed—none of which cases, (as the majority understand them) contain any decision, or intimation, that the act is to be so restricted in its operation. *Anderson vs. Turner*, 3 *Mar.* 131, first examined. *Davis vs. Young*, 300.
12. *Miller vs. Humphreys*, 2 *Mar.* 446, and *Hite's heirs vs. Shrader*, 3 *Litt.* 445, examined. *Ibid*, 303.
13. The boundaries of a settler's *claim*, and of his *actual settlement*, may be different. But, as far as permanent improvements have been made and used by a *bona fide* settler, in connection with, and subservient to his residence, and within the limits of the claim under which he settled—so far his "settlement" extends; and if *such* improvements extend into an adversary claim, he must be deemed a settler thereon; and, by adding to his improvements, he may enlarge his settlement; and, when he thus encroaches upon an adversary claim, within the limits of his own, he will be deemed a "settler" upon the interference from the time of the encroachment—when the statute begins to run, and, after seven years, affords its protection. *Davis vs. Young*, 303.
14. Judge Underwood, dissenting, is of opinion that, the first entry of the settler, with title, or his acquisition of title after entry, are the only points, at which the computation of time can commence. *Ibid*, 313-14.
15. To constitute an actual settlement upon land, to which there is an adverse, interfering claim, the dwelling house of the settler, or some of the improvements connected with it, must be *upon the lap*: otherwise the adverse claimant has no cause of action, and his right will not be affected. But whenever the settler encroaches upon the lap, it operates as notice to his adversary; who may then bring his suit; and if he fails to do so, for seven years, he will be barred. *Davis vs. Young*, 306.
16. Review of cases supposed to conflict with the interpretation given in this opinion, to the seven years' law: viz. *Bodley vs. Coghill's heirs*, 308. *Hog vs. Perry*, 308. *Smith vs. Nowells*, 309. *May's heirs vs. Jones &c.* 310—and conclusion that the cases of *Hite's heirs vs. Shrader*, *Miller vs. Humphreys*, and *Smith vs. Nowells*, favor the construction now given to the act, while there is *no case* containing even an intimation, conflicting with it. *Davis vs. Young*, 308-10.
17. Judge Underwood's view of, and conclusion upon, the cases mentioned in the last note,—in his dissent—*Ibid*, 320. His remarks upon the case of *Hite's Heirs vs. Shrader*, 322.
18. Where different settlers, under interfering claims to the same land, have improvements, united with their residences, upon the lap, and the possession of neither has been interrupted by the other, within seven years—the extent of the possession of each will depend on his title and other facts to be proved. *Davis vs. Young*, 310.
19. Requisites of the seven years' law, to enable a settler to avail himself of its protection—stated by Judge Underwood. *Davis vs. Young*, 313.

LIMITATIONS—*continued.*

20. Case upon the act of 1809 for the speedy adjustment of land claims &c. "the seven years' law." *Harrison vs. McDaniel*, 349.
21. Doctrines heretofore settled, viz.
 1. One who entered on land, intending to take possession of the entire tract, no part of which was then held adversely, is in possession to the extent of his claim—
 2. An actual possession can be divested, but by an adverse actual entry—not by a constructive entry: hence, where there are conflicting claims, and the owner of the inferior enters on, and takes possession of, the lap, a subsequent entry, under the better title, upon the interfering tract, but not on the lap, will not oust him.
 3. Where the holder of the superior title enters on the land, though not on the lap, his possession being, by construction, coextensive with his claim, a subsequent entry, under the inferior title, ousts him so far only, as he is encroached upon by actual enclosures.—And The foregoing principles apply as well to actual settlers, claiming protection under the "seven years law"—act of 1809, as to those protected by the previous acts of limitation. *Harrison vs. McDaniel*, 349.
22. The actual settler is protected, by the act of 1809, in the title and possession of land of which he has had continued possession, according to the above established doctrines, for seven years; but the protection does not extend to land of which he has never been so possessed.—His entry and settlement, under an inferior title, will not, beyond his actual enclosure, oust an adversary who had made a prior entry, and acquired a constructive possession, under a better title; nor will the act protect such subsequent settler's claim, against such better title, or bar the right of entry, or of action, under it, beyond his actual enclosure.—*Harrison vs. McDaniel*, 350.—Judge Underwood is of a different opinion. 355-62.
23. Every order or decree made in a chancery cause, which decides upon, and settles the rights of the parties, as to any particular matter, is so far final; an appeal or writ of error may be prosecuted upon it—although the suit remains in the court below, for other matters in the bill to be adjudicated upon; and the time to bar a writ of error upon any such order or decree, is to be computed from its date—not from the date of the last decision in the cause. *Banton and Wife vs. Campbell's Heirs &c.* 422.
24. The joint right of husband and wife to a writ of error, is not saved from the bar by time, by the coverture. *Banton and Wife vs. Campbell's Heirs &c.* 422.
25. Nonresidents were excepted from the statute limiting personal actions, until they were placed on the same footing with residents, by the act of 1823; and the computation of time against a party who has never been in the state, cannot be carried back beyond the date of that act. *Pate vs. Barrett and Wife*, 426.
26. The savings in favor of nonresidents, in the statute of limitations, having been repealed by the act of 1823, it may well be doubted, whether

LIMITATIONS—*continued.*

the chancellor should now place them on any better footing than residents. *Hunt &c. vs. Forman*, 471.

27. A complainant in chancery, seeking to enforce a demand of more than twenty years standing, must account for his delay, and show, by explicit averments *in his bill*, such facts, as will rebut the presumption of payment arising from lapse of time. *Hunt &c. vs. Forman*, 471.
28. In case of a bond and mortgage, the presumption of payment, from lapse of time, cannot be rebutted by showing *the insolvency* of the debtor; for as to the mortgagee and his debt, the debtor is not insolvent; because the creditor could, at any time, resort to the mortgaged premises, for payment. *Hunt &c. vs. Forman*, 471. But, see—
29. Dissenting opinion, of the Chief Justice, that the continued absence of the creditor from the state, or the insolvency of the debtor—facts which he conceives are sufficiently alleged and proved in this case—are either of them sufficient to rebut the presumption of payment arising from lapse of time; and, that the presumption of nonpayment, arising from the debtor's insolvency, is not rebutted, but rather confirmed, by the existence of a mortgage to secure the debt. *Ibid*, 472.

See *Injunctions*, 2. *Gift*, 1.

LINES AND CORNERS.

See *Boundaries*, 1.

LIS PENDENS.

See *Land Titles*, 4, 5. *Diligence*, 1, 2, 3. *Lien*, 6, 7. *Jurisdiction*, 13.

LOCATOR.

See *Equity*, 1.

LUNACY AND LUNATICS.

1. The terms "of unsound mind" or "*non compos mentis*" imply a total deprivation of reason, idiocy, lunacy, or any other description of madness. *Anne Jenkins vs. Jenkins' Heirs*, 103.
2. A person of unsound mind can not be married. The performance of a marriage ceremony and continued cohabitation till death, with one in that condition, will not constitute a legal marriage; nor give claim to dower, or courtesy, in his, or her, estate. *Anne Jenkins vs. Jenkins' Heirs*, 103.
3. A lunatic makes a deed, and afterwards, when sane, conveys the same land to another grantee: though the first deed is not absolutely void, the subsequent grantee, because of the privity of contract between him and the lunatic, may avoid it. *Cates &c. vs. Woodson*, 454.
4. A decree cancelling a sale made by a lunatic, in a suit in which his vendee was not before the court, does not bind the latter. *Cates &c. vs. Woodson*, 454.
5. Upon a bill against a lunatic in custody of a committee, service of process, upon the committee is sufficient; it is not proper to subpoena the lunatic himself. If the committee is a co-defendant, and before the

LUNACY AND LUNATICS—continued.

court in his own right, he has sufficient notice to defend for the lunatic. Where the committee is personally interested in the suit, the appointment of a guardian *ad litem* for the lunatic, is proper. *Cates &c. vs. Woodson*, 455. The decree was for land, the legal title to which was in the lunatic. Judge Underwood thinks the decree as to him, was void. *Ibid*, 458.

MALICIOUS PROSECUTION.

See *Evidence*, 33.

MARITIME JURISDICTION.

See *Jurisdiction*, 9, 10, 11. *Parties to Suits in Chancery*, 10.

MARRIAGE.

1. A person of unsound mind cannot be married. The performance of a marriage ceremony, and continued cohabitation till death, with one in that condition, will not constitute a legal marriage, nor give claim to dower, or courtesy, in his, or her, estate. *Anne Jenkins vs. Jenkins heirs*, 103.
2. Where a claim or defence depends upon the question, whether a person was of sound or unsound mind, at the time of his marriage, it is not necessary that there should have been a decree of nullification in his life time : the question may be made and decided in a suit for dower, for distribution, or the like. *Anne Jenkins vs. Jenkins heirs*, 105.

MASTER AND APPRENTICE.

1. A covenant to teach an apprentice an art and mystery, binds the covenantor to make him as good a workman in the trade as those generally are who have regularly learned it. If, however, the apprentice is so deficient in capacity as not to be able to learn the trade, this will excuse the master : but if such excuse exist, it is for him to aver and prove it, it will not be presumed in the absence of proof. *Barger vs. Caldwell*, 131.
2. Where a lad is apprenticed to learn a trade, and the indentures stipulate that the master shall teach him the art and mystery &c. it is not enough that he merely affords him sufficient opportunity and instruction to enable him to learn it ; it is the further duty of the master, not to leave the apprentice to follow his own inclinations, but to endeavor to keep him in correct habits generally, and take care that he applies himself to learn the trade. *Barger vs. Caldwell*, 132.

See *Pleas and Pleading*.

MEETING HOUSES.

1. The act of 1814 (2 Dig. 1057.) which, authorizing trustees to hold the land on which associations of christians erect their houses of worship, limits the quantity they may thus hold, to four acres—does not prohibit any religious society from acquiring and holding property in other modes, independent of the act. *Gass and Bonta vs. Wilhite &c.* 184.

MISTAKES.

1. In the absence of proof of fraud, or of mistake in drawing a *contract*, or subsequent modification of its technical import—a written contract must have the same effect in chancery, as at law—parol testimony, to change its effect, being inadmissible. *Harrison vs. Talbot*, 259.
2. In Virginia, it has been decided, that, where a very great difference (33 per cent.) has been discovered, between the *actual* and the *estimated*, quantity of land sold in the gross, the contract may be presumed to have been founded on a *gross mistake* as to quantity, and the injured party may have relief in chancery. And, also, that where the difference is not greater than a purchaser in gross might have anticipated, there can be no relief. *Harrison vs. Talbot*, 259.
3. Review of the various Kentucky decisions upon alleged mistakes in the quantity of land sold.—Result, that, in an *executed contract*, where there has been a *gross mistake* in the quantity sold, for “more or less,” the complaining party, who has practised no fraud, nor any culpable negligence, nor impaired his equity in any other way, is entitled to relief in chancery. And the condition of the injured party is still more favourable, where the opposite party comes into chancery *for a specific execution*—for then, *he* must show that he has a clear right to it, equitably and conscientiously : otherwise, he will be left to his legal remedy. *Harrison vs. Talbot*, 260.
4. Every case of a sale of land, upon which relief is sought in chancery, on the ground of mistake in the quantity, must depend on its own peculiar circumstances. *Harrison vs. Talbot*, 266.

See *Wills*, 2, 3.

MONEY.

1. The term *money*, in the technical sense of judicial proceedings, means nothing but gold and silver coin. *Pryor vs. The Commonwealth*, 298.

MORTGAGES.

1. A conveyance, *by mortgage*, passes the legal title to the mortgagee ; but if there is a possession of the land held adversely to the parties to the mortgage, it is within the champerty act of January 1824, and *void* ; and therefore, does not destroy the mortgagors's right of action against the tenants in possession. *Redman et al. vs. Sanders*, 69.
2. Possession by a mortgagor is not *per se* fraudulent ; nor is it, in general, any evidence of fraud in fact. *Snyder vs. Hitt*, 204.
3. The interest of a mortgagor is not subject to distress for rent : the acts subjecting equities to execution, do not subject them to distress. *Snyder vs. Hitt*, 204.
4. A mortgagee, like any other having a general or special property in goods converted, may maintain trover for the conversion. *Snyder vs. Hitt*, 204.

See *Limitations*, 28, 29. *Recording*, 6. *Lien*, 6.

MORTMAIN.

See *Charitable Uses*, 1.

NEW TRIALS.

1. Motions for new trials, in England, are made and decided, before judgment is entered. In this state, they are made at any time within the term—before or after judgment ;—and have the effect of suspending the judgment until the motion is disposed of—in the same or at a future term. Petitions for re-hearings in the Court of Appeals, have the like effect. *Turner's administrator vs. Booker, 334.*
2. A judgment suspended by a motion for a new trial, is not final : no writ of error lies, nor can execution issue, upon it. *Turner's administrator vs. Booker, 335.*
3. A motion for a new trial is a mere incident to the suit : not a separate action, that abates by the death of the mover ; its effects continue without any proceeding by his representative. Upon a *scire facias* to revive the judgment against his administrator, or by his consent, the motion may be disposed of. *Turner's administrator vs. Booker, 335.*
4. The death of a defendant, after judgment, and pending a motion for a new trial, does not abate the suit. *Turner's administrator vs. Booker, 336.*
5. Where a verdict and judgment are rendered for excessive damages, or other good ground for a new trial exists, and the defendant dies, the new trial should be granted to his administrator, although the action is one that does not survive, and will be destroyed entirely by granting the motion. But that may be prevented by terms. *Turner's administrator vs. Booker, 336, 338.*
6. Grounds for a new trial stated, and held sufficient. *Turner's administrator vs. Booker, 337.*
7. Sickness—the consequence of drunkenness, will not excuse want of due diligence, and entitle the party to a new trial. *Turner's administrator vs. Booker, 337.*
8. A new trial may be granted to a party who,—though he failed to use due diligence himself—did employ an agent to attend to the suit, who was competent, from his own personal knowledge, to show cause for a continuance, but was prevented from attending in time, by an accident which could not have been anticipated and guarded against. *Turner's administrator vs. Booker, 338.*
9. New trials may be granted upon conditions which will prevent injustice ; and where a defendant, in an action that does not survive, has died pending a motion for a new trial, the condition of granting it, should be, that the first judgment should stand as a security for the last. *Turner's administrator vs. Booker, 338.*

See *Evidence, 7.*

NON EST FACTUM.

See *Practice in Suits at Law, 18.*

NONSUIT.

1. The forfeiture for a nonsuit, is 50 lbs. of tobacco : the act of '95, which allowed 45s. was repealed by the act of '96. *Warner vs. Smith and Hart, 423.*

NOTES—*promissory*.

1. If the holder of a note, or bond, alters, or adds to it, without the consent of the obligor, he destroys its efficacy—which can never be restored without the concurrence of the obligor—erasing the alteration or addition will not do it. *Cotton vs. Edwards*, 106.
2. Where a note is signed and delivered, with a blank left for the sum payable to be inserted, there is a presumed authority for the holder to fill it with *any* sum—unless the amount is limited by the signer; and though he to whom the note is first delivered be restricted by the directions of the signer, as to the sum to be inserted, yet if the note comes to the hands of another, who, without notice of the restriction, fills the blank with a larger sum, the obligor will be bound by it.
Bank of the Commonwealth vs. Curry, 142.

See *Bills of Exchange*, 3.

NOTICE.

1. Upon an application to a county court for a partition of estate descended, among the heirs, it must be shewn, by *affidavit*, that such of them as do not appear, have been duly served with notice. *Palmer vs. Palmer and Others*, 390.
2. Upon an obligation containing a stipulation, that the obligee shall do some act before he shall enforce payment, no suit can be maintained, until the act is done, and the obligee has given notice of the performance, on his part, to the obligor;—which notice must be direct and authentic; information derived by the obligor, from one not authorized or requested by the obligee, to give it, is not sufficient notice.—*Hodges vs. Holeman*, 396.

See *Service of Process*, 8, 9. *Land Titles*, 4.

NUDUM PACTUM.

See *Bills of Exchange*, 2.

NUISANCE.

1. A public nuisance may be abated by *any body*; a private one only by those injured by it. *Gates vs. Blincoc et al.* 158.
2. To authorize the abating of a nuisance, the thing considered such must be so at the time it is abated;—that it had been a nuisance, and was likely to be so again, will not justify the proceeding. *Gates vs. Blincoc et al.* 158.
3. In case of imminent danger of a nuisance, it may be prevented by an injunction. *Gates vs. Blincoc et al.* 158.
4. An indictment is a proper remedy against one who has caused a common nuisance. *Gates vs. Blincoc et al.* 158.
5. Where a defendant attempts to justify the act for which he is sued, by showing, that it was only the act of abating a nuisance, *the jury* is to decide whether the nuisance was a public, or private one; and if the latter, whether it injured the defendant, so that *he* might abate it. Instructions which *disregard these distinctions*, and tell the jury that

NUISANCE—*continued.*

"if the dam was a nuisance, the defendant had a right to abate it," cannot be sustained. *Gates vs. Blincoc et al.* 158.

6. If a party, in abating a nuisance, does more injury to another than was necessary to effect the legitimate object, he is liable to an action.—*Gates vs. Blincoc et al.* 158.
7. A fence in a road is a nuisance, at common law ; and he who builds it may be fined and imprisoned. *Gregory vs. The Commonwealth*, 417.

OCCUPANTS.

See *Champerty*, 4.

OFFICERS—*who execute law process.*

1. An officer levying a *fiery facias* on a tenant's property, must have notice of the landlord's claim for rent, before he sells, or he will not be liable for it. *Craddock vs. Riddlesbarger*, 209.
2. If the officer sells, regardless of the landlord's lien, he is liable only for the net value of the goods &c. sold. *Craddock vs. Riddlesbarger*, 209.
3. Sheriffs were not entitled (before the act of 1830) to half commission for levying executions on goods that are afterwards replevied out of their hands. *Yantis et al. vs. Burditt et al.* 257.
4. The levy of a junior execution upon the property of a *stranger*, is no injury to the plaintiff, or to the surety of the defendant, in an elder execution, for which they can make the officer liable ;—the parties to the elder must show that the property sold was liable to it, to sustain an action against an officer for misapplying the proceeds. *Staton et al. vs. The Commonwealth, for Gill*, 398.
5. An officer, who with a *senior* and *junior* execution in his hands, levies the *latter* first ; in consequence of which, the former is satisfied by a sale of the property of a *surety*, is liable to the surety, for damages, to the full value of the surety's property sold : unless the defendant's effects were insufficient to satisfy the senior execution ; then the officer is only liable for so much of the surety's property as sold for the sum the effects of the principal brought ; not for what was required to make up the deficiency—the loss, by sacrifice, if any, being thus cast upon the officer. [Judge Underwood thinks the measure of damages against the officer is the proceeds of as much of the surety's property as was wrongfully sold, without regard to actual value and sacrifice.—*Staton et al. vs. The Commonwealth, for Gill*, 399.

See *Lien*, 4. *Service of Process*, 7, 8, 9. *Sales under Execution*, 7. *Attachments*, 2.

PARTIES—*to suits.***I. To suits in chancery.**

1. Parties to a bill in chancery who have not appeared, nor been summoned, are not bound by any agreement made by other parties who do appear. An agreement that the answer of one defendant shall be taken as the answer of another defendant also, can only be the agreement of those before the court, and will not authorize any decree against de-

PARTIES, to suits—continued.

- defendants who have not been served with process—actual or constructive. *Sanders' Heirs vs. Jennings and Trueman*, 37.
2. All parties to a cause in the court of appeals, continue to be parties in the court below, when the cause is remanded, and need not be summoned. *Madison's Executors &c. vs. Wallace's Executors &c.* 63.
 3. All joint defendants to an original bill, may properly unite in a cross bill. *Madison's Executors &c. vs. Wallace's Executors &c.* 64.
 4. To a bill for restitution of payments made under an erroneous, reversed decree—the creditor having died—his executors, if he, in his life time, or they, after his death, collected any part of the money, are proper defendants; so also is a devisee of the decree, who collected part of it, or his executor and heirs; so also are all the heirs and devisees of the party who recovered the erroneous decree. *Madison's Executors &c. vs. Wallace's Executors &c.* 64.
 5. To a bill to subject an equitable interest in land to the payment of a debt, under the act of 1823, or the lien of the vendor, the holder of the legal title is a necessary party. *Edwards vs. Bohannon*, 98.
 6. To a bill filed for the purpose of setting aside a will, all the devisees are necessary parties; and so is the executor, unless he has refused to act. *Vancleave &c. vs. Beam*, 155.
 7. No decree should be rendered, even in an *amicable suit*, unless all persons interested are parties. A want of indispensable parties appearing, in such case, this court directs a dismissal, unless they shall be made parties, in a reasonable time. *Muldrow's Executors &c. vs. Muldrow's Heirs &c.* 398.
 8. Upon a bill against a lunatic in custody of a committee, service of process, upon the committee is sufficient; it is not proper to subpoena the lunatic himself. If the committee is a co-defendant, and before the court in his own right, he has sufficient notice to defend for the lunatic. Where the committee is personally interested in the suit, the appointment of a guardian *ad litem* for the lunatic, is proper. *Cates &c. Woodson*, 455. [The decree was for land, the legal title to which was in the lunatic. Judge Underwood thinks the decree as to him, was void. *Ibid*, 459.
 9. In a suit to establish the complainant's right, and have partition of land, one to whom the complainant's vendor had, while a lunatic, sold the same land, is not a necessary party; nor is a locator, whose interest a defendant held under a decree and commissioner's deed. *Cates &c. vs. Woodson*, 452, 453, 458.
 10. Whenever a vessel or boat is libelled, all parties having claims for which she is liable, may intervene, and have decrees for their rightful shares of the proceeds. *Thoms vs. Southard, and e converso*, 483.
See *Practice in Chancery*, 7, 11. *Rescission of Contract*, 2, 4. *Equity*, 2, 3. *Executors and Administrators*, 13, 15.
 - II. Parties to suits returned from the Court of Appeals—See *Service of Process*, 3.
 - III. Parties to Motions—See *Executors and Administrators*, 12.

PARTITION OF LAND.

1. Upon an application to a county court, for a partition of estate descended, among the heirs, it must be shown, by *affidavit*, that such of them as do not appear, have been duly served with notice. *Palmer vs. Palmer and others*, 390.
2. To authorize a proceeding in a county court, for the partition of estate descended, among the heirs, it must appear, that the land, being within the county, is within the jurisdiction of the court. *Palmer vs. Palmer and others*, 390.
3. The purchaser of part of a tract of land, without designation of his boundary, cannot take choice of the part he will have, upon partition. *Improvements* should be regarded in making the allotments. *Cates &c. vs. Woodson*, 458.
See *Jurisdiction*, 8.

PAYMENT.

Presumption of Payment from lapse of Time—See *Limitations*, 27, 28, 29—See also—*Set-off*, 2.

PENAL OFFENCES.

See *Roads*, 1, 2. *Evidence*, 21. *Statutes*, 1, 2.

PENDENTE LITE PURCHASER.

See *Land Titles*, 4, 5, 6. *Diligence*, 1, 2, 3. *Lien*, 6.

PERPETUITIES.

See *Shakers*, 9.

PLEAS AND PLEADING.

As to pleading in *Chancery*, See *Practice in Chancery*.

1. A *scire facias* to revive a judgment in ejectment, may be met and defeated by a plea, showing that the demise was extended by an *ex parte* order, after the judgment. *Coghill's Heirs vs. Burriess*, 57.
2. The giving and receiving of one obligation, in lieu of another, the parties to which, or some of them, are different, may be pleaded as an accord and satisfaction.—The transaction must better the condition of one, or both parties; if it leaves them as they were, it is of no avail as an accord and satisfaction. *Bullen et al. vs. McGillicuddy*, 90.
3. Indentures of apprenticeship stating that the apprentice had been placed in custody of the master, the presumption is, that he so remained during the term; and, in declaring against the master for failing to teach him, it is not necessary to aver, as the performance of a condition precedent, that he did so remain. If the apprentice, by absconding, or otherwise, prevented the master from teaching him, the master must show that defence by plea and proof. *Barger vs. Caldwell*, 130.
4. In trespass for taking the plaintiff's horse, defendant pleads that, he, as constable, levied a *fi. fa.* on the horse &c.; replication that plaintiff was a *bona fide* house keeper &c., and the horse his only work beast *not previously levied on by execution*: this replication is bad; for it shows that the plaintiff had other horses at the time, which may have been his property, though they had been levied on. *Faulkner vs. Bradley*, 141.

PLEAS AND PLEADING—continued.

5. Special pleas of *non est factum* are construed with peculiar strictness : a plea of that description that does not show, by direct allegations, a state of fact wholly inconsistent with the presumption that the writing is the act and deed of the defendant—is insufficient. *Bank of the Commonwealth vs. Curry*, 142.
 6. A plea, to an action upon a note, alleging in general terms, that it was obtained by fraud and misrepresentation, is good, without stating the particulars of the fraud—which had, in fact, better be omitted. *Ross et al. vs. Braydon*, 161.
 7. Matter in abatement that might have been pleaded when the first plea was filed, or which existed before the last continuance, is not available at a subsequent term. But a former plea in abatement, or in bar, is no objection to filing another, alleging matter that has occurred since the last continuance. *Gaines vs. Conn's heirs*, 231.
 8. A conversion by a wife, is a conversion to the husband's use : and he only can be sued for it. Where the conversion was by both jointly, he alone, or both jointly; may be sued. If they are joined, the declaration must allege that the conversion was (not to *their*, but) to *his* use. *Estill and Wife vs. Fort*, 238.
 9. A count, in trover, charging a conversion by husband and wife, to his use, and one charging a conversion by the wife alone, may well be joined. *Estill and Wife vs. Fort*, 239.
 10. If there be one count good, in trover, (though the others may be bad,) it will sustain a general verdict. *Estill and Wife vs. Fort*, 239.
 11. A consideration for a bill of exchange is implied, and need not be averred in the declaration. *Early vs. McCart*, 415.
 12. A plea of fraud, or of want of consideration, to an action on a bill of exchange, against any other party than that from whom the plaintiff received the bill, must, besides averring the fraud or want of consideration, aver that the plaintiff gave no value for it ; or that he had notice of the fraud, or notice that there was no consideration, and the bill not drawn for the accommodation of the payee. *Early vs. McCart*, 416.
 13. Action on a bond to several, conditioned that certain property, involved in a suit in chancery, shall be produced, to abide the decree : plea that one of the obligees dismissed the suit, so far as he was concerned, and obtained no decree, is bad. If there is no such decree as the declaration avers, issue should be taken on the averment. (See *Release*, 2.) *Blakey &c. vs. Blakey et al.* 463.
 14. Where the interest and cause of action, of two or more joint covenantees, is several and not joint, each may maintain his separate action on the covenant ;—and if the several covenantees join in an action to enforce the separate right of one, the misjoinder is fatal, and the declaration bad on demurrer. *Blakey &c. vs. Blakey et al.* 463.
- See *Abatement and Revivor*, 1, 2. *Indictment*, 2. *Executors and Administrators*; 1. *Trespass*, 1. *Set-off*, 1. *Release*, 2.

PLEDGE.

See *Recording*, 1.

POSSESSION, of *Land*.

As to possession of *Slaves*—See *the next title*.

1. A landlord who settles a tenant, without bounds, is in possession to the extent of his claim. But if the tenant is restricted, by metes and bounds, to a part only of the land, the landlord's possession, by this tenant, is in like manner restricted. So, where the proprietor of a tract sells a portion of it, designated by metes and bounds, and the vendee enters, his possession, depending upon the *quo animo* of his entry, which must have been to take possession of his own land merely, is restricted to his own boundaries, and has no effect as an entry upon, or possession of, the rest of the tract. *Jones vs. Chiles*, 29.
2. Where co-tenants make partition, and hold their shares in severalty, if a junior patentee, whose claim covers the whole tract, or more than one of the shares, makes an entry upon the land, his possession does not extend beyond the boundaries of the share upon which his entry is made, and the other shares are unaffected by it: for one co-tenant, after partition, is not bound to protect the allotments of the others. *Jones vs. Chiles*, 29.
3. A claimant cannot avail himself of the possession of a former tenant whose title he has not acquired. *Jones vs. Chiles*, 30.
4. The possession, to bar an adverse entry, by time, must be continued—uninterrupted: for the law will not allow that time is progressing against a claimant, when he can find no occupant on the land, to bring suit against. *Jones vs. Chiles*, 31.
5. The possession acquired under a *habere facias* upon a judgment in ejectment, has relation back to the commencement of the suit; and the time between that and the execution of the *habere facias* (though the execution has been long delayed by injunction, or otherwise,) cannot be counted to make up twenty years of adverse possession. *Jones vs. Chiles*, 32.
6. If two ejectments, by different plaintiffs, with different titles, are pending at the same time, against the same tenants, who, unconnected with either, hold adversely to both; and one of the plaintiffs having recovered his judgment, is put into possession; after which the other also recovers—the latter cannot turn out the former, by virtue of his *habere facias* against the defendants to both suits. The right, as between these two successful claimants, must be tried in a suit between them, before either can turn the other out. *Jones vs. Chiles*, 33.
7. If the plaintiff in a *habere facias* is disturbed after being put into possession, his remedy is by writ of forcible entry, or ejectment. *Fowler vs. Currie et al.* 52.
8. Recital of evidence—which, though it does not show that there were not intervals between the periods during which different tenants occupied,—is yet, held sufficient to authorize a jury to infer, that the party's possession was unbroken for twenty years or more,—and sustain the verdict. *Forman et al. vs Ambler*, 109.

POSSESSION, of *Land*—*continued*.

9. Instructions, that "if the jury believed that T. M. and those claiming under him were in *possession* of the land in controversy *more than twenty years*, before they were divested" &c. held to be erroneous—because not sufficiently explicit, (as 'the possession' must have been adverse and continual,) and may have misled the jury. *Forman et al. vs. Ambler*, 110.
10. If a party holding a tract of land, acquires title *by deed* to an adjoining tract, his possession is presumed to be extended to the limits of his new purchase. *4th Mon.* 452. So also, although his new purchase was by an executory, parol contract, if he entered upon it, under the authority of the vendor, his possession will be held to include it, and he may maintain a writ of forcible entry and detainer, against an intruder.—*Boyce vs. Blake et al.* 127.
11. A judgment in ejectment establishes (as against the defendants,) the plaintiff's right of entry; and the execution of the *habere facias* enables him to take and hold the possession: he cannot, when he so entered, be dispossessed by warrant of forcible entry. *Yeates vs. Allin*, 134.
12. Where one relies upon the fact, that his possession is by actual enclosure, he must prove it—it will not be presumed. *Smith's heirs vs. Frost's devisee* &c. 148.
13. The established principles, as to the extent to which a party acquires possession, by making an entry upon land, laid down, and the authorities cited. *Smith's heirs vs. Frost's devisee* &c. 148.
14. A possession, by the mere occupancy of a tenant who disclaims holding of him under whom he entered, and, without his landlord's consent, attorns to a stranger, is of no avail to the stranger; and if the landlord, after the departure of the tenant, resumes the possession, it is no forcible entry upon the land of him to whom the tenant thus unlawfully attorned. *Blue et al. vs. Sayre*, 214.
15. An actual enclosure is not necessary to constitute a "possession," within the meaning of the champerty act of 1824. *Moss et al. vs. Scott*, 274.
16. A verdict against a defendant in ejectment not in possession at the institution of the suit, should not be sustained. *Moss et al. vs. Scott*, 275.
17. Where different settlers, under interfering claims to the same land, have improvements, connected with their residences, upon the lap, and the possession of neither has been interrupted by the other, within seven years—the extent of the possession of each will depend on his title and other facts to be proved. *Davis vs. Young*, 310.
18. Doctrines now *settled*, viz.
 1. One who entered on land, intending to take possession of the entire tract, no part of which was then held adversely, is in possession to the extent of his claim—
 2. An *actual* possession can be divested, but by an adverse *actual* entry—not by a constructive entry: hence, where there are conflicting claims, and the owner of the *inferior* enters on, and takes possession

POSSESSION, of Land—continued.

of, the lap, a subsequent entry, under the better title, upon the interfering tract, but not on the lap, will oust him.

3. Where the holder of the superior title enters on the land, though not on the lap, his possession being, by construction, coextensive with his claim, a subsequent entry, under the inferior title, ousts him so far only, as he is encroached upon by actual enclosures. *Harrison vs. McDaniel*, 349. (See *Limitations*, 22.)

19. A party who has title, by a deed, to two adjoining tracts, granted by two separate patents, and makes an entry on the land, acquires a possession coextensive with his title by the deed. *Harrison vs. McDaniel*, 354.

See *Champerty*, 1. *Limitations*, 8, 13. *Injunctions*, 2.

POSSESSION—of Slaves.

1. If one lends a slave to another, which, after a term, is to revert or pass to a third party, the termor, during his possession, holds under the bailor, not under the reversioner. *Merrill vs. Tevis*, 163.
2. If the agreement for the reversion, in such case, was not in writing, duly acknowledged and recorded; and the bailee and those claiming under him retain the possession, in this state, for five years before suit, creditors and purchasers under the bailee, without notice, will be protected by the statute of frauds.—The same principle applies to the children of the slave, born during or after the five years. But the holding by the bailee and those claiming under him, must be in this state; the statute does not apply to a possession held in another state. *Ibid*, 163.
3. One was possessed of a slave to hold for a term, after which it was to vest in another, and when the term expired, they were both living together in the same family: the actual possession may be presumed to have changed at the moment when the right of possession changed—a jury may so find, without proof of any action of the parties in reference to the possession. *Merrill vs. Tevis*, 163.

See *Detinue*, 1.

POWERS.

1. A power given to a plurality of persons cannot be exercised by a part of them; and this rule, the common law, before the 21 of H. VIII., applied to executors, when, to them, by their proper names, a mere power was given; for then it was supposed to be given to them as individuals, and not as executors. *Muldrow's Heirs vs. Fox's Heirs &c.* 78.—But—
2. Where the power is conferred upon executors, merely as such; or where it is coupled with an interest, or with an express trust consequent upon the primary power, (though given to the executors *nominatim*,) it is to be understood as conferred upon them in their fiduciary character, collectively; and it survives as long as more than one remains;—but not to a single one. *Ibid*, 79.
3. Where there is a naked power given to executors to sell land, it does not, at common law, survive to one:—*aliter*, when the power is coupled

POWERS—*continued.*

- with an interest. Where it depends upon the discretion of the nominees, whether there shall be a sale or not, the statute of '97 does not apply. *Muldrow's Heirs vs. Fox's Heirs &c.* 80.
4. The chancellor cannot enforce the execution of a *mere power*. But if the power is connected with a trust, or if it be *the duty* of the depository to execute it, the chancellor may enforce its execution; or he may supply a defective execution.——A decree made, in such a case, with all necessary parties before the court, can be impeached only by a regular proceeding—not incidentally, in a trial at law; there it must have its due influence. *Muldrow's Heirs vs. Fox's Heirs &c.* 82.
 5. If a decree is made requiring executors to sell land, as directed by the will, the omission to comply for a long time (six years,) does not invalidate the power. But the testator's intentions must be observed, and if he has limited a time, and that has passed, the power is gone, the chancellor cannot revive it. *Muldrow's Heirs vs. Fox's Heirs &c.* 83.
- See *Authority*, 1. *Wills*, 8, 10.

PRACTICE IN THE COURT OF APPEALS.

1. A will was proved and admitted to record in the county court; and afterwards (without fault of the executor or clerk) was lost. Upon the trial of a writ of error brought to reverse the order establishing the will, a sworn copy being produced, this court dispensed with the production of the original, received proof of its due execution, and affirmed the decision of the county court. *Lane's Will*, 106.
2. If a bill of exceptions, to the refusal of a court to give instructions, does not set out some evidence to which the instructions would apply, they may be deemed irrelevant, and this court will not decide that the refusal was erroneous. *Barger vs. Caldwell*, 133.
3. A party was bound to keep the peace, and appear at *the next* circuit court. There was a failure to hold the next regular term; and the judge, at the term after that, deeming the cognizor exonerated, dismissed the suit. This was error, but as the party was not bound to appear after the first court actually held, and the reversal would avail nothing, the writ of error is therefore dismissed. *The Commonwealth vs. Cayton*, 139.
4. Whether the practice of the Supreme Court of the United States, as to the effect of a remittitur in the court below, after error brought, should be the rule here—a question suggested, not determined. *Harrod vs. Hill*, 165.
5. This court will not decide whether a decree is void or not, in a case where the purchaser of an estate sold under the decree, is no party—as on *that*, his title depends. *Coger vs. Coger*, 271.
6. This court, upon reversing a decree for want of evidence to sustain it, where there is no defect of parties, will not open the decree for further preparation or proof; but will remand the cause for dismissal, or for such decree as the proof will justify. *Daniel vs. Ballard*, 296.

PRACTICE IN THE COURT OF APPEALS—*continued.*

7. A petition for a rehearing suspends the judgment or decree of the Court of Appeals, until the petition is disposed of, in the same, or at a subsequent, term. *Turner's Administrator vs. Booker*, 334.
8. This court will not, in general, change the date of a decision, or make any order, to aid a party in prosecuting a writ of error, in a case where the Supreme Court of the United States has jurisdiction. *Bank of the Commonwealth vs. Swindler et al.* 393.
9. The court, under certain circumstances, will direct that the court below, to which a cause is remanded, shall, *ex officio*, order a survey.— See *Practice in Chancery*, 26, or *Curdwell &c. vs. Strother &c.* 446. See *Costs*, 4. *Bill of Exceptions*, 1, 2, 4. *Inferences and Presumptions*, 4. *Instructions*, 5. *Practice in Chancery*, 90. *Writ of Error*, 3.

PRACTICE IN CHANCERY.

1. A party not in possession cannot maintain an original bill to quiet his title, or compel the relinquishment of an adverse claim. But where one in possession brings his bill against those from whom he derives title, and makes others, also, from whose claims he apprehends danger, defendants—requiring them to interplead with his vendors—the chancellor will take jurisdiction as between these defendants, and settle the whole controversy; and the jurisdiction, having once attached, will not be taken away by the dismissal of the original bill; a decree upon any remaining cross bill, will be effectual. *Harris vs. Smith &c.* 11.
2. Parties to a bill in chancery who have not appeared, nor been summoned, are not bound by any agreement made by other parties who do appear. An agreement that the answer of one defendant shall be taken as the answer of another defendant also, can only be the agreement of those before the court, and will not authorize any decree against defendants who have not been served with process—actual or constructive. *Sanders' Heirs vs. Jennings and Trueman*, 37.
3. The administrator and heirs cannot join in a suit for rents of the decedent's land. (See *Rent*, 1.) *O'Bannon vs. Roberts' Heirs*, 64.
4. An administrator *and* heirs having filed their bill for rents—the joinder being improper; the heirs afterwards file a separate bill, for rents accrued after the filing of the former (irregular) bill, to which they refer: on the hearing of both suits amalgamated, the first is properly dismissed, with costs, for the misjoinder; but the heirs, upon their separate bill, referring to the former joint one, have a decree for the whole amount shown to be due them by both bills. *O'Bannon vs. Roberts' Heirs*, 54.
5. The court that rendered an erroneous decree, has, after a reversal, power to order restitution. If the cause, being remanded, is still pending, the restitution may be applied for, *by cross bill*—in which new matter of defence may be introduced, to defeat or diminish the complainant's recovery—as a defendant at law may plead facts occurred *puis darrein continuance*. *Madison's Executors &c. vs. Wallace's Executors &c.* 63.

PRACTICE IN CHANCERY—continued.

6. If a complainant dies, pending a suit, and his representatives fail to revive it—the defendant, or his representatives, may, nevertheless, file and maintain their cross bill, which may proceed, and be heard before the original bill, or without any revivor of the latter. *Madison's Executors &c. vs. Wallace's Executors &c.* 63.
7. Where the bill shows that the complainant holds the equitable lien of a vendor of land, for the purchase money, there may be a decree to enforce it, under the general prayer for relief, though such decree is not expressly prayed; and time may be allowed to bring in the necessary parties. *Edwards vs. Bohannon*, 98.
8. The bill charges, that a man was of unsound mind at the time of his marriage, and so continued till his death; the answer, passing by the gist of the charge, 'admits that she was his lawful wife at the time of his death, and therefore, as such, insists upon her right to dower:'—allegation of the bill taken *pro confesso*. *Anne Jenkins vs. Jenkins' Heirs*, 103.
9. Where a claim or defence depends upon the question, whether a person was of sound or of unsound mind, at the time of his marriage, it is not necessary that there should have been a decree of nullification in his life time: the question may be made and decided in a suit for dower, for distribution, or the like. *Anne Jenkins vs. Jenkins' Heirs*, 105.
10. At a sale of land under execution, the debtor and the sheriff represented that certain improvements were within the bounds of the tract put up and sold; which not being the fact, the purchaser was deceived:—held that the best, if not the only, remedy for him, is in chancery; that he may there have a rescission of the contract, and restoration of the purchase money—with interest; that he may assert a lien on the land—the execution debtor being insolvent; which may be sold; and if the proceeds fall short of what the complainant is entitled to, he may have a decree, against the execution debtor, for the balance. No relief being prayed against the *plaintiff in the execution*, he is not a necessary party. *Vaughan vs. Myers &c.* 113.
11. The purchaser, from a distributee, of his interest in a decedent's estate, may maintain a bill, in his own name, for the share he purchased—marking his vendor and other distributees, as well as the administrator, parties. *Kavanaugh vs. Thacker's Administrator and Distributees*, 137.
12. In a suit *at law*, upon an executor's or administrator's bond, for a refusal to make distribution, it may be necessary for the plaintiff to aver and prove, that, before the suit, he tendered a bond to refund in case debts should appear: in chancery, the rule is not so strict; there, the whole controversy may be settled, though no bond has been tendered, and the complainant, first being required to give the bond, may have the appropriate relief. *Kavanaugh vs. Thacker's Administrator and Distributees*, 137.
13. The chancellor will not in every case of a suit prematurely brought, dismiss the bill for that cause; sometimes, where new pleadings show

PRACTICE IN CHANCERY—*continued.*

- the cause of action to be complete at the hearing, relief will be afforded—the complainant being made to pay costs up to the time of such new pleadings. *Kavanaugh vs. Thacker's Administrator & Devises*, 157.
14. A bill is filed to set aside a will, on the ground that the testator was of unsound mind: defendant pleads that the writing is the last will &c., the replication negatives the plea; this issue being referred to a jury, the right to open and conclude the argument to them, belongs to the defendant, who holds the affirmative—"it is his will" &c. *Vancleave vs. Beam*, 155.
 15. A decree rendered upon constructive service of process, remains in force—although the defendants may have obtained an order to open it, filed answers &c.—until it is *set aside* by sentence of the court, *after the hearing* upon the matter of the answers;—and the pendency of a suit upon the answers so filed, cross bills &c. will not prevent the prosecution of a writ of error, and reversal of the decree. *Davis' Heirs vs. Bentley*, 247.
 16. In the absence of proof of fraud, or of mistake in drawing a contract, or subsequent modification of its technical import—a written contract must have the same effect in chancery, as at law—parol testimony, to change its effect, being inadmissible. *Harrison vs. Talbot*, 259.
 17. A vendor of land, having sold the tract very much under its value, in consequence of mistaking the quantity it contained—and being found entitled to relief in chancery, and having offered in his bill to retain the surplus, or convey it, upon receiving its value—the vendee shall be allowed to take his choice, before the final decree is rendered, and the decree will be accordingly. *Harrison vs. Talbot*, 268.
 18. A complainant cannot have a specific execution of a contract in writing, varied or modified by parol evidence. *Harrison vs. Talbot*, 268.
 19. The complainant in a cross bill, not duly prepared, cannot complain that his cross bill is continued at the trial of the original bill. *Taylor vs. Lyon*, 277.
 20. A cause remanded: complainant to have leave to amend his bill, and show circumstances, appearing to exist, which will sustain his injunction, and entitle him to relief in chancery. *Taylor vs. Lyon*, 280.
 21. The answer of a principal debtor, admitting his insolvency, is not evidence of that fact, against a co-defendant—his surety. *Daniel vs. Ballard*, 296.
 22. Parties in chancery, seeking a specific execution of their contracts to convey land, may be allowed time to perfect their titles, or to obtain evidence of their sufficiency. *Beckwith vs. Marryman and Others*, 373.
 23. To close a chancery cause, and leave the intentions of the court to be carried into effect by commissioners, in the country, is erroneous: the cause should be retained until the court is satisfied that the commissioners have paid over the funds in their hands. *Banton and Wife vs. Campbell's heirs &c.* 422.
 24. To authorize an administrator to retain a *reasonable* fee to be paid to

PRACTICE IN CHANCERY—*continued.*

- counsel, leaving the administrator to determine what is reasonable, is erroneous. *Banton and Wife vs. Campbell's heirs &c.* 423.
25. A decree for the distribution of money among heirs, should show how much each is entitled to: it should not be left open, for administrators or commissioners, to ascertain the respective portions. *Banton and Wife vs. Campbell's heirs &c.* 423.
26. The omission of a party to procure an order of survey to show that a survey and patent are in conformity to the entry—there being no allegation of a want of conformity—is not fatal:—the court deciding in favor of the entry, might, *ex officio*, order a survey to ascertain whether there was an interference, and to what extent. The court of appeals, remanding the case for further proceedings, directs that the survey shall be ordered. *Cardwell &c. vs. Strother &c.* 446.
27. A complainant in chancery, seeking to enforce a demand of more than twenty years standing, must account for his delay, and show, by explicit averments *in his bill*, such facts as will rebut the presumption of payment arising from lapse of time. *Hunt &c. vs. Forman*, 471.
28. One of two owners of a steam boat files a bill against the other, to prevent him from selling his share, to enforce a mortgage on it, and subject the boat to a reimbursement of his own advances, and the claims of other creditors: he can maintain his suit for this object, and have a final settlement of all transactions connected with the joint ownership; and the *lis pendens* gives the complainant an equitable lien, of which he cannot be divested, by any subsequent levy or sale. *Thoms vs. Southard, and e converso*, 480.
- See *Costs*, 2, 3. *Charitable Uses*, 3. *Choses in Action &c.* 3. *Dower*, 3. *Jurisdiction*, 4. *Mistakes*, 2, 3. *Powers*, 4.

PRACTICE IN SUITS AT LAW.

1. Whether the lines of a survey, or tract of land, *were ever marked*, and if so, *where*, are questions of *fact*, to be proved, and determined by a jury, and not mere deductions of law to be decided by the judge.—*Dimmitt vs. Lashbrook*, 2.
2. An unrecorded deed has no effect against a subsequent *bona fide* purchaser, for a valuable consideration, without notice; but whether the party to be prejudiced by the deed, is that description of purchaser, or not, is a question to be determined by a jury, not by the court. *Chiles et al vs. Conley's Heirs*, 23.
3. An executory contract for land, with twenty years possession, being shown, a jury may, without further proof, presume a legal conveyance; but the nature of the holding in such a case, may be explained, and the presumption rebutted, by proof tending to a contrary conclusion. It is a presumption, founded upon law *and fact*, which a jury may indulge, or reject: not a mere conclusion of law. They should be instructed as to the legal effect of the possession &c. and left to decide upon all the evidence. For the judge to decide absolutely that the legal title has passed, because an executory contract and twenty years possession appear, is erroneous. *Chiles et al. vs. Conley's Heirs*, 24.

PRACTICE IN SUITS AT LAW—continued.

4. Confession of lease, entry and ouster, in ejectment, supersedes the necessity of any proof of actual ouster. *Fry, Vaughan et al. vs. Smith et al.* 40.
5. The declaration in ejectment, must be filed on the first day of the term to which the notice is returnable. If filed afterwards, it is irregular, and the judgment subject to reversal. *Fry, Vaughan et al. vs. Smith et al.* 40.
6. Service of the declaration and notice in ejectment, is the commencement of the suit. *Redman et al. vs. Sanders*, 68.
7. The chancellor cannot enforce the execution of a mere power. But if the power is connected with a trust, or if it be the duty of the depository to execute it, the chancellor may enforce its execution; or he may supply a defective execution. A decree made, in such a case, with all necessary parties before the court, can be impeached only by a regular proceeding—not incidentally, in a trial at law—there it must have its due influence. *Muddrow's Heirs vs. Fox's Heirs &c.* 82.
8. Whether one obligation was given in satisfaction, or as a guarantee, of another,—being a question of intention,—is to be decided by a jury.—*Bullen et al. vs. McGillicuddy*, 91.
9. Upon a change of venue, there must be a reasonable time allowed for preparation after the removal, before either party can be forced into trial—unless the clerk of the court to which the cause is removed, received the papers at least ten days before the first of the next term, neither party can, at that term, demand a trial. *Lewis et al. vs. Outten*, 93.
10. Notes discounted by the Bank of Kentucky, are placed upon the same footing with foreign bills of exchange, as to the remedy, and its effects, against the drawers and endorsers—and them only: so that actions of debt may be brought against the drawers and endorsers jointly, or any one of them separately. But the representatives of a deceased drawer or endorser can not be joined with the survivors. *Tilford et al. vs. Bank of Kentucky*, 114.
11. A bill of exceptions to a decision, that a particular question might be put to a witness, must show what testimony had been previously given—otherwise this court cannot say the question was improper. *Barger vs. Caldwell*, 130.
12. A recognisance for the appearance of a party on the first day of the next court, binds him to appear at the first court actually held: a failure to hold the court and loss of the term, at the regular time, will not exonerate him. *The Commonwealth vs. Cayton*, 138.
13. A recognisance was forfeited by the failure of the principal to appear in court according to the condition; but, as the court next after the recognisance, was not held at the time fixed by law, the judge considered the cognisor exonerated, and dismissed all proceedings on the recognisance: this was erroneous, and the order of no effect. *The Commonwealth vs. Cayton*, 139.

PRACTICE IN SUITS AT LAW—*continued.*

14. Where a defendant attempts to justify the act for which he is sued, by showing, that it was only the act of abating a nuisance, *the jury* is to decide whether the nuisance was a public, or a private, one; and if the latter, whether it injured the defendant, so that *he* might abate it. Instructions which, *disregard these distinctions*, tell the jury that if the dam was a nuisance, the defendant had a right to abate it, cannot be sustained. *Gates vs. Blincoe et al.* 158.
 15. In replevin, where it appears by the officer's return, that he had restored the property replevied, it is error to render a judgment *retorno habendo*; nor will a remittitur of the damages, also adjudged to the defendant, cure the error, as *that* is no release of the judgment for a return. *Harrod vs. Hill*, 165.
 16. A female plaintiff, visited by defendant, seeking to settle the controversy—denied, in a state of alarm, that she authorized, or knew of, the suit, and said she had no demand on defendant:—not ground for a *non suit*; the jury may take this, with the other evidence, and allow it what weight they will. *Coleman vs. Simpson*, 167.
 17. If a judge, while instructing or addressing a jury, uses language calculated to induce them to believe that it is their duty to decide a fact submitted to them, one way or another, as by telling them, that "it is the plainest case he ever saw in court"—"that the note *was proved* to have been altered" or the like—the jury being the triers of the facts, the evidence of which they are to weigh—he commits an error, for which the judgment may be reversed. *Allen vs. Kopman*, 221.
 18. If two joint obligors are sued, and one pleads *non est factum*, has a verdict in his favor upon the issue, and judgment in bar, the plaintiffs may proceed to take judgment against the other obligor. But he cannot dismiss the suit as to him who pleads in bar, leaving him thereafter liable, and proceed against the other: the latter, if sued alone, might plead the nonjoinder of his co-obligor in abatement, and cannot be deprived of the effect of this right, by such dismissal. *Hickman vs. Anderson*, 223.
 19. The death of a party, suggested on the record at one term, cannot be pleaded in abatement at a subsequent term, by plea *puis darrein continuance*: the record is an estoppel. *Gaines vs. Conn's Heirs*, 232.
 20. Chancery cannot relieve against a judgment, upon the ground that the verdict was rendered excessive by erroneous deductions of the jury, from the evidence: a new trial at law, is the only remedy. *Pogue vs. Sholwell &c.* 284.
 21. Whether the act sued for, was the result of design, or of negligence, is to be decided by a jury. *Johnson vs. Castleman &c.* 382.
 22. The forfeiture for a nonsuit, is 150 lbs. of tobacco: the act of 1795, which allowed 45 shillings, was repealed by the act of 1796. *Warner vs. Smith and Hart*, 423.
- See *Assumpsit*, 3. *Abatement and Revivor*, 6. *Bills of Exchange*, 3. *Bill of Particulars*, 1, 2, 3. *Constable*, 2. *Evidence*, 22. *Instructions*, 1. *New Trials*. *Scire Facias*, 1, 2.

PRESUMPTIVE EVIDENCE.

See *Inferences and Presumptions*. See also, *Evidence*, 7, 5. *Executors and Administrators*, 6. *Limitations*, 26, 27, 28, 29. *Possession of Slaves*, 3.

PRINCIPAL AND SURETY.

1. One who becomes bound as a surety, at the instance and for the benefit of a co-surety (who afterwards pays the whole debt) is not liable to him, for contribution. *Daniel vs. Ballard*, 296.
2. A surety who has paid the whole debt, and goes against a co-surety for contribution, must show the insolvency of the principal, to entitle him to recover. *Daniel vs. Ballard*, 296.
3. The answer of a principal debtor, admitting his insolvency, is not evidence of that fact, against a co-defendant—his surety. *Daniel vs. Ballard*, 296.

PROCESS, service of—

See *Service of Process*.

QUIT RENTS.

See *Land Titles*, 2.

QUANTUM MERUIT.

See *Attorneys*, 1.

RAIL ROAD.

See *Roads*, 2. *Service of Process*, 7, 8, 9.

RECOGNISANCE.

1. A recognisance for the appearance of a party on the first day of the next court, binds him to appear at the first court actually held; a failure to hold the court and loss of the term, at the regular time, will not exonerate him. *The Commonwealth vs. Cayton*, 139.
2. A recognisance was forfeited by the failure of the principal to appear in court according to the condition; but, as the court next after the recognisance, was not held at the time fixed by law, the judge considered the cognisor exonerated, and dismissed all proceedings on the recognisance: this was erroneous, and the order of no effect. But as the cognisor was liable for the breach, if any, and not bound to appear at any time after that—a reversal of the order would be in vain, and the writ of error is therefore dismissed. *The Commonwealth vs. Cayton*, 138.

RECORDING—REGISTRATION.

1. There is no law requiring a pledge to be recorded. Two persons are owners of a boat—both in possession; one being indebted to the other, gives him a lien on his share, reciting, that he has 'hypothecated, pledged and mortgaged' it; the creditor continues his possession and control: considering the transitory, locomotive character and use, of the subject of the lien, it is held, that the transaction is a pledge, and not such a mortgage as must be recorded to give it validity. *Thoms vs. Sothard, and e converso*, 479.

RECORDS.

See *Evidence*, 2, 3.

RELEASE.

1. A release of one of several obligors exonerates the whole. A covenant never to sue a sole obligor, is, in effect, a release. But a covenant not to sue one of several joint obligors, does not exonerate the others; nor even operate as a release to the covenantee; who, if sued, will be left to his action, for redress. *Mason et al. vs. Jouett's administrator*, 107.
2. A bond is executed, the object and condition of which are, to secure the respective rights of the several obligees, as they shall be ascertained by a chancery suit—as the forthcoming of slaves, in which each one claims an interest: it is not competent for one of the obligees to make a release which shall affect the rights of the others; and the release of one, who had no interest, or had transferred his interest, so that nothing was awarded to him by the decree, is void. A plea, to an action on the bond, setting up a release by such obligee, is a departure, and the issue, whether of law or fact, immaterial. *Blakey &c. vs. Blakey et al.* 461.

RELIGIOUS SOCIETIES.

See *Shakers. Meeting Houses.*

RENT.

1. The administrator and heirs cannot join in a suit for rents of the decedent's land: the rent accrued in decedent's life time, belongs to the administrator, who has his cause of action for it: that accrued after his death belongs to the heirs, who have a separate cause of action for it. *O'Bannon vs. Roberts' Heirs*, 54.
2. A tenant having married the daughter of his landlord, is told by him, after the expiration of the lease, and without any new stipulation for rent, that he may continue to occupy the land: held that he is not liable, under this permission, for any rent, accrued while the father in law lived. *O'Bannon vs. Roberts' Heirs*, 54.
3. One co-parcener may be made liable, in chancery, to the others, for their shares of the rents and profits of any part of the land which he exclusively occupies; and he, being sued by them, may have his cross bill for his share of any land occupied by them to his exclusion; have the benefit of a set-off, and the costs of his cross bill. *O'Bannon vs. Roberts' Heirs*, 54.
4. The interest of a mortgagor is not subject to distress for rent: the acts subjecting equities to execution, does not subject them to distress.—*Snyder vs. Hitt*, 204.
5. The landlord has a lien on the goods and chattels belonging to his tenant, and found upon the rented land, for one year's rent, or what less may be due; and the officer who levies a *fiere facias* on them, having notice of the landlord's claim, is bound to pay or tender to him (or his agent,) such arrears of rent; and should thereupon, take and sell enough of the tenant's property to pay both demands. *Craddock vs. Riddlesbarger*, 207.

RENT—continued.

6. An officer who sells a tenant's goods under a *fiere facias*, without due notice of the landlord's rent claim, is not liable to him. *Craddock vs. Riddlesbarger*, 209.
7. The net value of the goods, is the extent of officer's liability. *Craddock vs. Riddlesbarger*, 209.
8. The lien for rent is only for the year last preceding the levy. *Craddock vs. Riddlesbarger*, 209.
9. A bill of sale under a *fiere facias* is equivalent to a removal of the goods, and vests the title, free of the landlord's claim. *Craddock vs. Riddlesbarger*, 209.
10. It is the rule of the common law, that goods in the custody of the law, (taken in execution &c.) are not subject to distress for rent; and neither the statute 8 Anne, nor any statute of Kentucky, have essentially changed this rule, though they give a new remedy—requiring the creditor who has a levy made on a *tenant's* goods &c. to pay the landlord his rent in arrear, not exceeding one year; and rendering the officer who, with notice of the landlord's claim, makes such levy, *liable*, if he proceeds to sell, without satisfying the rent claim. So far only does the lien extend; it does not affect the title of the purchaser at the execution sale. The remedy is against the creditor and officer. *Craddock vs. Riddlesbarger*, 209.
11. At common law, property of a stranger found on rented land, was subject to the landlord's distress; but if one purchased the growing crop under execution, and left it to ripen, this was an exception; it was not liable. In Kentucky, the law by which the property of a stranger might be distrained for rent, has been changed by statute, and the goods &c. of the defendant in the distress warrant, or some subtenant on the land, are alone liable to be taken. *Craddock vs. Riddlesbarger*, 212.
12. The covenant of a lessee to pay rent, concerns the realty, and binds his assignee for the rent due after the assignment. *McCormick vs. Young*, 294.
13. Notes or bonds given for rent, the payment of which is secured by lease, not being of higher nature, do not extinguish the rent; for which the assignee of the lease is liable, notwithstanding the landlord may have taken the notes of his lessee, for it. *McCormick vs. Young*, 294.
14. Assumpsit, for use and occupation (as between landlord and tenant) may be maintained, even upon an *implied contract* to pay. *Jones et al. vs. Tipton*, 295. But—
15. A vendor cannot maintain assumpsit against a *vendee*, for his use of the land, while in possession under a contract of sale, afterwards rescinded. As between them, and in this view, the relation of tenancy does not exist; and the law implies no promise by the vendee, to pay rent. *Ibid*, 295.

RENTS AND PROFITS.

See *Equity*, 5. *Covenant*, 3. *Set-Off*, 3.

RENUNCIATION—of the Will, by a Widow.

See Dower, 1, 2, 3.

REPLEVIN.

1. In replevin, where it appears by the officer's return, that he had restored the property replevied, it is error to render a judgment *retorno habendo*; nor will a remittitur of the damages, cure the error, as that is no release of the judgment for a return. *Harrod vs. Hill*, 165.
2. The plaintiff in replevin (other than between tenant and landlord,) failing in his action, he and his sureties are liable on their bond (taken under the act of 1830,) for the value of the goods replevied, where the value is less than the amount of the execution, with interest, and ten per cent. on the value of the goods, as damages. *Yantis et al. vs. Burditt et al.* 254.
3. The damages given, by the act of 1830, against the plaintiff in replevin who fails in his action, are ten per cent. on the value of the goods replevied, if that is less than the amount of the execution; and on the amount of the execution where the value of the goods exceed it—without regard to time. The interest given by the same act, is to be computed from the time when the writ of replevin was executed, not from its date. *Yantis et al. vs. Burditt et al.* 256.
4. The plaintiff in replevin (under the act of 1830) failing in his action, is liable to the defendant, for the reasonable amount of fees, above the taxed fee, which he has to pay to his attorney for services required in consequence of the replevin. *Yantis et al. vs. Burditt et al.* 256.
5. Sheriffs were not entitled (before the act of 1830) to half commission for levying executions on goods that are afterwards replevied out of their hands. *Yantis et al. vs. Burditt et al.* 257.

REPLEVIN BOND.

1. A replevin bond—to have the force of a judgment, must be acknowledged before an officer—otherwise it is but a common law bond, on which no execution can legally issue. *Williams et al. vs. Hall*, 97.
2. A constable is not liable for any failure to act upon an execution issued upon a mere common law bond, not having the force of a judgment.—*Williams et al. vs. Hall*, 97.
3. Where a replevin bond does not purport to have been acknowledged before an officer, evidence is admissible to show that, a private person took the acknowledgment. *Williams et al. vs. Hall*, 97.

RESCISSION OF CONTRACT.

1. Fraud or mistake in making a contract, must be established, to justify a decree for rescission, or relief on the ground of advantage obtained by one of the parties. *Brown vs. Parish*, 8.
2. At a sale of land under execution, the debtor and the sheriff represented that certain improvements were within the bounds of the tract put up and sold; which not being the fact, the purchaser was deceived: held that the best, if not the only, remedy for him, is in chancery; that he may there have a rescission of the contract, and restoration of the pur-

RESCISSION OF CONTRACT—*continued.*

chase money—with interest; that he may assert a lien on the land—the execution debtor being insolvent; which may be sold; and if the proceeds fall short of what the complainant is entitled to, he may have a decree, against the execution debtor, for the balance. No relief being prayed against the *plaintiff in the execution*, he is not a necessary party. *Vaughan vs. Myers &c.* 113.

3. Defect of title, where there is no fraud in the sale, the contract executed, and no eviction, is no ground for rescission, or injunction against collecting the purchase money. The grantee is presumed to rely upon the covenants inserted in the conveyance, and must abide by his legal remedy—unless there are such circumstances connected with the defect of title as will hinder him from obtaining redress at law: in which case, he may obtain an injunction, to stop the collection of the purchase money, until a decision upon the title can be had. *Taylor vs. Lyon*, 277.
4. A vendee of land, by bill in chancery, asks for a rescission of the contract, restoration of the money he had paid, an injunction &c. upon the ground that his vendor had no title, and is insolvent; and afterwards, by amended bill, prays for a specific execution, as to so much as the vendor can show title to: it appearing, that the vendor had no title to part of the land, and not a clear one to any of it, the vendee cannot complain of a decree rescinding the contract entirely. *Williams vs. Rogers*, 374.
5. When a contract for the sale of land, which the purchaser has paid for, and was put in possession of, is rescinded, for causes free of fraud, the use of the money, and the use of the land, are held to balance each other: the decree should, in general, restore the money to the purchaser without interest—the land to the vendor, without rents or profits.—*Williams vs. Rogers*, 375. But—
6. If the purchaser has made valuable and lasting improvements on the land; or if it has suffered in his hands through neglect or mismanagement—these things are the subjects of valuation, account, and final settlement by the decree. *Williams vs. Rogers*, 375.

RESIDENCE.

See *Limitations*, 10, 13.

RESTITUTION.

1. An erroneous decree having been satisfied, and afterwards reversed, the defendant is entitled to *restitution*—for which he, or his executor, heirs and devisees, or the representatives of a devisee who collected the decree, or part of it—are liable. That the bill does not show how much was collected by each, or either of them, is not ground for demurrer—that may be shown by the answers and proofs, and the court may, by its decree, settle the liabilities and rights of all parties. *Madison's Executors &c. vs. Wallace's Executors*, &c. 62.
2. The court that rendered an erroneous decree, has, after a reversal, power to order restitution. If the cause, being remanded, is still pending, the restitution may be applied for by a *cross bill*—in which new matter of defence may also be introduced, to defeat, or diminish the complain-

RESTITUTION—continued.

ant's recovery—as a defendant at law may plead facts occurred *purs derrein continuance*. *Madison's Executors &c. vs. Wallace's Executors &c.* 63.

REVERSION AND REMAINDER.

See *Possession of Slaves*, 1, 2, 3.

REVIVOR, of Suits.

See *Abatement and Revivor*.

RIGHT OF ENTRY.

See *Entry, Right of—*

RIGHT OF PROPERTY—Trial of.

See *Sales under Execution*, 7.

ROADS.

1. If a party indicted for obstructing a road, would defend himself by showing that he was authorized by the county court, to change the course of the road, he must prove that he had opened the new road *in conformity to the order*, before he closed the old one. The proof that the new road is variant from the order, does not devolve on the Commonwealth. *The Commonwealth vs. Cornell*, 136.
2. In a proceeding to ascertain the damages to the owner, upon the appropriation of land for the Lexington and Ohio Rail Road, the sheriff's return must show, that all the requisitions of the act incorporating the company (§15,) have been complied with. *Harper vs. Lexington and Ohio Rail Road Company*, 227.
3. The act (of 1797) concerning public roads, declares that—"where any fence shall be made across, or in, any public road, the *owner or tenant* of the land shall pay" the penalty: no other person is made liable, and no indictment can be maintained *under the act*, unless it charges that the accused was the owner or tenant of the land. *Gregory vs. The Commonwealth*, 417.
4. A fence in a road, is a nuisance, at common law; and he who builds it may be fined and imprisoned. *Gregory vs. The Commonwealth*, 417.

SALES.

See the two following heads—*Sales of Slaves, Chattels &c.* and *Sales under Execution*—for matters belonging to those heads respectively.
Sales of Land.

1. The deed of land conveyed is the best evidence of the terms of sale, and must prevail (as evidence of the contract) unless there is clear proof of fraud, or of some mistake—such as would never occur without great want of heed in the complaining party. *Brown vs. Parish*, 9.
2. A party, for a sum certain, sells a piece of land, by its known name and boundaries, refusing to stipulate for, or to state, the quantity. The vendee, before the execution of the deed, ascertains the true quantity; but practises no fraud nor any concealment about it. Though the piece

SALES—*continued.*

- contains more than twice as much in fact, as the vendor supposed, he must abide the consequence of his inadvertency, having no remedy, or cause of complaint. *Brown vs. Parish*, 9.
3. The revenue law of 1799, under which land was sold for taxes, saved the rights of *femes covert*s—a sale of land in which any *feme covert* was a joint owner was invalid, and the register's deed passed no title. *Harris vs. Smith &c.* 12.
 4. A sale of land for which the vendor has recovered a final judgment—though the land remains in the possession of the defendants—the *habere facias*, not being executed, is not within the champerty act of 1824—the sale is not of a mere “pretenced title,” and is valid. *Jones vs. Chiles*, 35.
 5. Quere suggested, whether the sale of an entire tract, part of which is held adversely, would be void as to the whole, or as to the part held adversely: not decided. *Jones vs. Chiles*, 36.
 6. Land devised to be sold, may be sold by the *acting executors*, where no one is appointed by the will to make the sale, or the nominee refuses to act, or dies before the sale. *Statute of 1797*, §44. *Muldrow's Heirs vs. Fox's Heirs &c.* 76.
 7. The act of 1797 comprehends cases, like this, where executors are directed to sell, and some of them do not accept the trust; and authorizes the sale by those who act. *Muldrow's Heirs vs. Fox's Heirs &c.* 76.
 8. If there is a positive direction in a will that land shall be sold, its being coupled with a direction that the executors shall “lay out the proceeds to the best advantage for the children,” does not change it, or render the sale discretionary with the executors; though part of them who accept the trust may make the sale, while the concurrence of all might be required to distribute the proceeds. *Muldrow's Heirs vs. Fox's Heirs &c.* 81.
 9. In Virginia, it has been decided, that, where a very great difference (33 per cent.) has been discovered, between the *actual*, and the *estimated*, quantity of land sold in the gross, the contract may be presumed to have been founded on a *gross mistake* as to quantity, and the injured party may have relief in chancery. And, also, that where the difference is not greater than a purchaser in gross might have anticipated, there can be no relief. *Harrison vs. Talbot*, 259.
 10. Review of the various Kentucky decisions upon alleged mistakes in the quantity of land sold. Result, that, in an *executed* contract, where there has been a *gross mistake* in the quantity sold, for “more or less,” the complaining party, who has practised no fraud, nor any culpable negligence, nor impaired his equity in any other way, is entitled to relief in chancery. And the condition of the injured party is still more favourable, where the opposite party comes into chancery for a *specific execution*—for then, he must show that he has a clear right to it, equitably and conscientiously: otherwise, he will be left to his legal remedy. *Harrison vs. Talbot*, 260.

SALES—continued.

11. Every case of a sale of land, upon which relief is sought in chancery, on the ground of a mistake in the quantity, must depend upon its own peculiar circumstances. *Harrison vs. Talbot*, 266.
 12. Sales of land in gross may be subdivided into four classes—each class defined. *Harrison vs. Talbot*, 266.
 13. Where the sale of land was by the tract, or where the quantity is stated merely by way of description, chancery can afford no relief (when there is no fraud) on the ground of mistake in the quantity. *Harrison vs. Talbot*, 266.—But—
 14. Where it appears that though the sale was in gross—the parties did not contemplate or intend to risk more than a common surplus, or deficit; or where the sale, though technically a sale in gross, was, in fact, a sale by the acre, the injured party may have relief in chancery—provided he has not, by his conduct, waived or forfeited his equity.—*Ibid*, 267.
 15. Though a written contract may describe a sale of land, as a sale in gross, according to the technical import of the writing, parol evidence—not necessarily conflicting with the written evidence, may be admitted, to show that the contract was in fact made with reference to the number of acres, as to which the parties were under a gross mistake, when the contract was drawn. *Harrison vs. Talbot*, 267.
 16. A *pendente lite* purchaser, and the purchaser of the legal title to an estate, with notice of an outstanding equity, do not stand upon precisely the same footing.—*The former* is absolutely concluded by the decision of the pending suit—which might otherwise be rendered nugatory by alienations of the estate; and if the suit be not prosecuted successfully, the purchaser is not affected by it; it does not operate as notice to him. *The latter* acquires the legal title by his purchase, and can only be divested of it, by a suit upon the equity of which he had notice, and a decree against him. *Watson vs. Wilson*, 408.
- See *Vendor and Vendee*, 1. *Rescission of Contracts*, 2. *Infants*, 2. *Sales under Executions, Decrees, &c.* 1, 5, 6.

SALES—of Slaves, Chattels and Commodities.

1. In the sale and assignment of a judgment, without recourse, there is no implied warranty, that the judgment and proceedings are free of error. The purchaser runs that risk; and cannot, in case of a subsequent reversal of the judgment, recover back, or avoid the payment of, the price paid, or stipulated for it, upon the ground of a failure of consideration. *Glass vs. Read*, 168.
 2. *Dicta*—in the sale of a note there is an implied warranty, that it is *genuine*—no forgery. But no warranty (where the assignment is without recourse) that the authority of an agent, by whom the note purports to have been executed, was good and sufficient. *Glass vs. Read*, 168.
- See *Condition precedent*, 1. *Dower*, 1. *Fraud*, 1. *Landlord and Tenant*, 3. *Lien*, 6. *Sales under Execution*, 2.

SALES—under Executions, Decrees, &c.

1. If land be sold under execution, to which the defendant had only an equitable title, or some other claim not subject to the levy, the sale may be quashed. *Adams' Heirs vs. Russell and Kaiser*, 140.
 2. Perennial trees and plants, with their ungathered produce, are incidents of the soil, and not subject to execution; all the products of annual planting and cultivation are personal property, subject to sale by the owner, and were, previous to the act of 1834, subject, even ungathered and unripe, to levy and sale under execution; and the purchaser may enter upon the land, to mature and remove the crop. *Craddock vs. Riddlesberger*, 206.
 3. An officer having levied upon a growing crop, might proceed to sell it, as soon as advertised &c.; neither he, nor the creditor, was bound to attend to the future cultivation, or incur the risk of its loss or injury while ripening. *Craddock vs. Riddlesberger*, 206.
 4. A bill of sale under a *fiery facias* is equivalent to a removal of the goods, and vests the title, free of the landlord's claim. *Craddock vs. Riddlesberger*, 209.
 5. If the decree, under which real estate is sold, is *void*, the purchaser acquires no title; if it is merely erroneous, his title may be good, though the decree be reversed. *Coger vs. Coger*, 271.
 6. A decree, upon a bill for a foreclosure and sale, which orders, that, unless the defendant pay so much, by such a day, his "equity of redemption in and to the mortgaged premises," shall be sold, authorizes the sale of *that equity only*:—not of the mortgagee's interest—especially where the advertisement and deed by the commissioner are in conformity to the decree, and the sum produced by the sale, inconsiderable. Such a deed does not pass the legal title to the estate. *Southard vs. Guthrie*, 340.
 7. When a sheriff summons a jury to try the right of property, and they cannot agree, the claimant fails to succeed, the sheriff is bound to sell, and is not liable to any suit on account of such sale. *The Commonwealth, for Sanders, vs. Herndon &c.* 429.
- See *Officers*, 1, 2. *Conveyances*, 6, 10, 11. *Lien*, 5.

SCIRE FACIAS.

1. Requisites of a *scire facias* against bail, under the act of 1829. *Frost vs. Reynolds*, 94.
2. A *scire facias* which does not contain the necessary recitals and allegations to show the legal right of the plaintiff to have judgment against the defendant, is insufficient, and will be quashed on demurrer. *Frost vs. Reynolds*, 94.

See *New Trials*, 3. *Pleas and Pleading*, 1.

SERVICE OF PROCESS.

1. When a writ of *habere facias* is executed the judgment is satisfied: any subsequent *habere facias* on the same judgment, is illegal, and may be quashed. *Fowler vs. Currie et al.* 52.

SERVICE OF PROCESS—continued.

2. Parties ousted by execution of an illegal process, are entitled to a writ of restitution—by which all may be placed in statu quo. *Fowler vs. Currie et al.* 52.
3. All parties to a cause in the Court of Appeals, continue to be parties in the court below, when the cause is remanded, and need not be summoned. *Madison's Executors &c. vs. Wallace's Executors.* 63. *Moss et al. vs. Scott*, 273.
4. The service of a warrant of forcible entry and detainer must be by notice to each defendant in person—constructive notice—as by copy left &c. is insufficient. *Lewis et al. vs. Outten*, 92.
5. Written notice left at the 'supposed most common place for him (defendant) to be found,' is not a good constructive service. *Lewis et al. vs. Outten*, 93.
6. In a proceeding to ascertain the damages to the owner, upon the appropriation of land for the Lexington and Ohio Rail Road, the sheriff's return must show, that all the requisitions of the act incorporating the company (§ 15) have been complied with. *Harper vs. Lexington and Ohio Rail Road Company*, 227.
7. The sheriff may make a return after the case has been reversed, and remanded for new proceedings—on which, if it is sufficient, the court may give judgment. *Ibid*, 227.
8. It is not indispensable that the notice to the owner of the land, should be by personal service. *Ibid*, 227.
9. A return of the writ "executed" implies a legal notice to the owner of the land. *Ibid*, 227.
11. Upon an application to a county court, for a partition of estate descended, among the heirs, it must be shown, by *affidavit*, that such of them as do not appear, have been duly served with notice. *Palmer vs. Palmer and others*, 390.
12. An officer, having an execution against a defendant whose property is upon the possessions of a stranger, may enter upon the stranger's land, and go into his buildings—breaking open out-houses, and entering into the dwelling house when it is found open, to levy on the defendant's goods. But these things the officer does at his peril: if the defendant has nothing upon the premises subject to the levy, the officer, the plaintiff directing him, and those assisting will be deemed trespassers *ab initio*. *Walker &c. vs. Fox*, 405.
13. An officer cannot lawfully enter by force, into a dwelling house, (to lift the latch and enter, is to enter by force) to levy an execution on the goods of the owner, or any other goods deposited there without fraud or covin; nor to serve civil process upon any of those who dwell in the house. But the occupant of a house cannot use it, to protect the goods of others from execution, or to screen strangers from the service of process; and where goods have been deposited, or strangers have taken shelter, in the house, for such purposes, and are not surrendered upon the requisition of the officer, he may break open the house, and go in, to serve his process. *Walker &c. vs. Fox*, 405.

SERVICE OF PROCESS—*continued.*

14. A constable may execute an attachment for a debt above £5; but having done so, he must deliver the process and property to the sheriff of his county, who is to proceed with it as though he had levied it himself. A return by the constable will not authorize judgment upon it; the attachment will be dismissed. *McMekin vs. Beatty and Johnson*, 459.

See *Decrees*, 2. *Parties to Suits in Chancery*, 8.

SET-OFF.

1. Liquidated demands only can be set off against each other, at law. The right is mutual, and if the demand of *either* party is unliquidated, there can be no set-off. Set-off of demands ascertained,—or depending on mere computation,—may be pleaded in assumpsit, or covenant, as well as in debt. But, where the demand of *the plaintiff*, or that of *the defendant*, depends on proof, the plea is inadmissible. In this case, upon a note, payable in *such money as was received at a certain bank*, the plea of set-off is held to be bad—the *value* of the money being uncertain. *Hanna & Co. vs. Pleasants and Bridges*, 269.
2. If a partial payment be made upon a note, which is afterwards paid in full, or merged in a renewal, without deduction of the partial payment, that may then be considered as so much money had and received by the payee, to the use of the party who paid it; and he may maintain assumpsit for it, or may plead it as a set-off, *pro tanto*, against the new note. It cannot be deemed a payment on the new note, not executed until after the money was paid. *Wake et al. vs. The Bank of the Commonwealth*, 394.
3. Sale of land; vendee put in possession, under a covenant for the title;—vendor, from inability, without fraud, fails to make the title; vendee abandons the possession, brings his action on the covenant, and recovers the purchase money *and interest*. The vendor is, in equity, entitled to compensation for the use of the land, as a set-off against the interest. The vendee is accountable for rents and profits, and for waste, during the time he held the possession, and is entitled to an allowance for improvements, viewed as additions to the value of the land when it was abandoned; the balance against the vendee, on an account comprising those items, to be set off against the interest included in his judgment. *Lowry vs. Cox's Executor and heirs*, 469.

SETTLEMENT—SETTLER.

1. The meaning of the terms 'settler'—'settlement,' as used in the Kentucky statutes generally, discussed, by Judge Underwood, in a dissent. *Davis vs. Young*, 311.
 2. Requisites of the seven years law, to enable a settler to avail himself of its protection. pr. Judge Underwood. *Davis vs. Young*, 313.
- See *Limitations*, 10, 11, 13, 15.

SEVEN YEARS LAW.

See *Limitations*, 10, 11, 13, 15.

SHAKERS.

1. Society at Pleasant Hill, Mercer County, Kentucky.—Their articles of association, called "the covenant." *Gass and Bonta vs. Wilhite &c.* 170-2.
2. It is clear, that, because of the third article, there can be no division of the effects *according to what each member brought in*; and equally clear, upon the whole covenant, that the *intent* is, that the whole property and labor of each member shall be devoted to "the church," as a *quasi* corporation, for "charitable purposes," the support of continuing members &c. forever: and the question is, whether such a covenant is valid in law. *Ibid*, 172.
3. The grounds upon which the right of the seceding members, to have a partition of the property, is asserted. *Gass and Bonta vs. Wilhite &c.* 174.
4. The English statutes of mortmain and of charitable and superstitious uses have ever been construed as applying to *corporations* exclusively. The 23 of H. VIII. c. 10, which declares, that certain feoffments, made in trust, to the intent to have obits perpetual, the continual services of a priest &c. shall be void, have never, to this day, been held to invalidate trusts made for charitable and useful purposes *not deemed superstitious*. *Gass and Bonta vs. Wilhite &c.* 175.
5. The use created by the covenant of the Shakers, is not such as would be held superstitious in England; nor is there any thing illegal, according to the laws of this state, in the uses to which their property is devoted. [See the views of Judge Underwood, in his Dissent.] Here, where the constitution guaranties freedom and equality to all religions, it is not competent for the legislature, or courts, to denounce a use or trust made for the benefit of any religious society, as a *superstitious use*. *Gass and Bonta vs. Wilhite &c.* 176.
6. The clause in the Shaker's "covenant" that permits the trustees, with the assent of the society, to make donations to strangers—permissive merely, and indefinite as to amount—is entitled to no influence upon the question whether the trust is for a charitable use. *Gass and Bonta vs. Wilhite &c.* 179.
7. The objects and purposes of the society and association called *Shakers* considered; and determination that those objects and purposes are such as must, in this state and under our constitution and laws, be deemed charitable and pious; and that the trust and use created by "the covenant," or articles of agreement among the members, are valid in law. *Gass and Bonta vs. Wilhite &c.* 180. The views of Judge Underwood, in his dissent. 185-208.
8. The poor &c. though not expressly provided for, by the Covenant of the Shakers, are not excluded from the benefits of the charity. *Gass and Bonta vs. Wilhite &c.* 180.
9. The trust established by the Shakers' "covenant," is not void as being *a perpetuity*; for where a trust is for a charitable use, its being a perpetuity is no objection to it. *Gass and Bonta vs. Wilhite &c.* 183.

SHAKERS—*continued.*

10. "The covenant" of the Shakers is not a covenant in restraint of the freedom of religious faith. *Gass and Bonta vs. Wilhite &c.* 183.
11. Shakers seceding and withdrawing, cannot compel the society to distribute, or allow to them, any portion of the common property. *Gass and Bonta vs. Wilhite &c.* 185.
12. Dissent, by Judge *Underwood*—who is of opinion, that the statute 43d Elizabeth, does not embrace the "covenant" of the Shakers, and the trust and uses thereby created; that their property is not, in fact, devoted to charitable uses, within the meaning of that statute. That if the covenant be construed as an agreement to forfeit the estate of the covenantor, upon his changing his religion, it is an agreement without consideration; contrary to the spirit of the constitution, and void.—That the effect of the covenant, so far as relates to the property of the society, is merely to constitute a general partnership, for an unlimited time,—connected with an agreement, that the property shall be preserved and increased by the industry and care of the members, so long as they respectively live, and the share of each, upon his death, pass to the survivors. That this is a partnership from which any member may, at will, withdraw, without relinquishing his interest in the joint property; and that a member may, at any time, declare the partnership, as to himself, dissolved, and demand his due share of the joint effects: which declaration and demand, should be sanctioned and sustained by the chancellor, and decreed accordingly—without further interference, however, with the rights or interests of those who may choose to remain in the society and continue the partnership in the common property. *Gass and Bonta vs. Wilhite &c.* 185.

See Charitable Uses, 2

SLAVES AND SLAVERY.

1. Slaves—though they descend and pass as real estate, (by statute,) do not vest in the heirs, without the assent of the personal representative, in whose hands they are (by the same statute) assets, and in whose hands alone they can be reached by creditors. *Wells vs. Bowling's Heirs*, 42.
2. The property of heirs in slaves inherited, does not render *them* liable to judgment, upon the obligation of their ancestor. When there is neither executor nor administrator, the title to the slaves—like the title to the personal property—rests in abeyance. *Wells vs. Bowling's Heirs*, 43.
3. Where the condition of a penal bond, or the effect of a covenant, is, that the obligor, or covenantor, shall restore or deliver a certain slave, at a specified time,—and after the execution of the writing, and before the time for the restoration or delivery of the slave, he *runs away*, or dies, and the obligor, or covenantor, cannot recover him, by proper efforts and diligence, he shall be excused from performance; and no action can be maintained against him for this breach. *Keas et al. vs. Yewell*, 248.

SLAVES AND SLAVERY—*continued.*

4. Detinue cannot be maintained for a slave after his death: though it may be maintained where the defendant has parted with the possession, or where the slave was in being when the action was instituted, but died afterwards. *Caldwell vs. Fenwick*, 332.
 5. Extracts from the Statute of Pennsylvania, for the gradual abolition of Slavery, 432.
 6. All persons born in Pennsylvania, since the act of that state, for the gradual abolition of slavery, took effect, in 1780, were born free. 'Those then in slavery there, continued so. Children born afterwards, who but for the act would have been slaves, became apprentices—with all the liabilities and immunities of white apprentices—bound to serve those to whom as slaves they would have belonged, until they attained twenty eight years of age: unless those entitled to their services, as apprentices, abandoned them, when they were to be bound out, for the same term, by the overseers of the poor. *Barringtons vs. Logan's Administrators*, 433.
 7. *Partus sequitur ventrem* is the law of Kentucky. No one born here of a free woman, can ever be a slave. The birth right is determined by the *lex loci*. *Barringtons vs. Logan's Administrators*, 434.
 8. A woman born of a slave, in Pennsylvania, since 1780, though subject to apprenticeship till twenty eight years old, was born free. And her children, though born in Kentucky, and within the period of the mother's apprenticeship, are unqualifiedly free. *Barringtons vs. Logan's Administrators*, 434.
 9. The children born in Kentucky, of a bond mother, that was a slave in Pennsylvania, when their abolition act passed, in 1780, and so not emancipated by that act—are slaves for life in Kentucky. 1 *Bibb*, 615. *Barringtons vs. Logan's Administrators*, 435.
 10. A coloured person born in Pennsylvania, who, by the act abolishing slavery there, was subject to apprenticeship till twenty eight years old, may be held to the like service, for the same term, here: but is not a slave. 1 *Bibb*, 615. *Barringtons vs. Logan's Administrators*, 435.
- See *Possession of Slaves*, 1, 2, 3.

SPECIFIC EXECUTION OF CONTRACTS.

See *Equity*, 6. *Executors and Administrators*, 13, 15.

STATUTES—*Construction of.*

1. When a penal statute is repealed, or so modified as to exempt a class of cases from its operation, violations committed before, as well as those committed after, the repeal or modification, are exonerated—unless some private right will be divested by it. *The Commonwealth vs. Welch*, 330.
2. Where a penal statute gives "the amount recovered," or part of it, to a prosecutor, his title to it depends upon *the recovery*; till which, he has no vested right that will prevent a repeal of the statute from discharging an offender. *The Commonwealth vs. Welch*, 331.

STATUTES, *construction of—continued.*

3. Act of 1833 declares that the previous acts against gaming are not repealed by it. *Hickman vs. Littlepage*, 345.
4. Though an act may declare, that it is not to repeal any pre-existing statute on the same subject, still, if any provision of a pre-existing statute is clearly inconsistent with the new act, so far it must be repealed of necessity. *Hickman vs. Littlepage*, 345.

STATUTE OF FRAUDS.

See *Possession of Slaves*, 1, 2.

STEAM BOAT.

1. A part owner of a boat may keep it employed, and will not be accountable to the others, if it is lost or damaged in the usual trade. *Thoms vs. Southard*, and *e converso*, 493.
2. A party who has instituted a suit to subject a vessel or boat to sale, to satisfy demands to which she is, or can be made, liable, cannot translate the litigation, by sending her to a foreign port, and there libelling her himself. But, as part owner, he may send her, in her accustomed trade, to a foreign port; and if she is there libelled by another party, who may legally subject her to sale, the former may intervene, and claim his share of the proceeds; and—to prevent them from being distributed entirely to others—may bring in *all his claims* upon the vessel or boat; thus, in effect, transferring the jurisdiction, rendering his first suit nugatory, and subject to dismissal. *Thoms vs. Southard*, and *e converso*, 494.
3. Mortgage, Pledge or Hypothecation of a Steam Boat. See *Recording*, 1. See *Lien*, 7, 8. *Jurisdiction*, 10.

SUPERSTITIOUS USES.

See *Charitable Uses*.

SURETIES.

See *Principal and Surety*. Also, *Officers*, 4, 5. *Evidence*, 28.

SURVEYS.

See *Boundaries*, 1

TAVERNS AND TIPLING HOUSES.

1. Taverns where no liquors are retailed, and not in, nor within half a mile of, a town or city, may be kept without license. An act of 1834 repealed all laws requiring such tavern keepers to obtain licenses.—*The Commonwealth vs. Welch*, 330.
2. The Commonwealth, suing for a fine for keeping a tavern (where no liquor is retailed) without a license, must show that it was kept in a town or city, or within half a mile of one: she must make out the whole case by proof. *The Commonwealth vs. Welch*, 330.
3. For keeping a tippling house, the offender incurs a penalty of sixty dollars—the aggregate of ten dollars imposed by an act of 1793, and of fifty dollars imposed “in addition” by the act of 1831. *Barnes vs. The Commonwealth*, 389.

TAVERNS AND TIPPLING HOUSES—continued.

4. Evidence that a man sold liquor by retail, which was drunk in the house where it was bought, authorizes the inference that he kept a tippling house. *Barnes vs. The Commonwealth*, 389.
5. A tavern license should designate the house where the tavern is to be kept, and will not serve for any other house, it is not transferable from house to house, by the removal of the tavern keeper. *Barnes vs. The Commonwealth*, 389.
6. Upon the trial of an indictment for keeping a tippling house at a certain time, evidence of an offence committed at an after time, is inadmissible. *Barnes vs. The Commonwealth*, 390.
7. A license having been granted to one man, to keep tavern in a particular house, from which he afterwards removed—another being indicted for retailing spirituous liquors in that house, may show that he did it, as the agent, or partner, and under the license of, him to whom it was granted; and may, on that ground, be acquitted by the jury. *Barnes vs. The Commonwealth*, 390.

See *Statutes*, 1.

TRAVERSE.

See *Forcible Entry and Detainer*.

TRESPASS.

1. One having a right of entry upon land, may enter (without the aid of a *habere facias*) against the will of a tenant in possession, if he can do so peaceably, and without trespassing upon the person or rightful property of the tenant; and, though he may be turned out again by warrant of forcible entry and detainer—trespass *quare clausum fregit* will not lie, for he may plead *liberum tenementum*, and justify under his right of entry. *Yeates vs. Allin*, 134.

See *Husband and Wife*, 3, 4. *Action*, 4, 5, 6, 7. *Service of Process*, 12.

TROVER.

See *Action*, 1. *Husband and Wife*, 3, 5. *Pleas and Pleading*, 10.

TRUSTS.

See *Conveyances*, 3. *Shakers. Charitable Uses*, 2.

USURY.

1. Where one party delivers to another, depreciated bank notes, and takes an obligation for their nominal amount, payable in specie, at a future day, with interest—the transaction, nothing else appearing, ~~must be~~ taken to be a usurious lending. *Warfield's Administrators vs. Boswell &c.* 225.

VENDOR AND VENDEE.

1. A purchaser, *pendente lite*, from the landlord of tenants sued in ejectment, is bound by the judgment, for, or against, them. *Jones vs. Chiles*, 34.

VENDOR AND VENDEE—continued.

2. A vendee required to surrender a *surplus* of land, may elect from which end or side of the tract it shall be taken. *Harrison vs. Talbot*, 268.
3. Vendee is not liable, in *assumpsit*, for use and occupation, upon a rescission of the contract of sale. *Jones et al. vs. Tipton*, 295.
4. The vendor of land, is a trustee (pending the executory contract) of the legal title, for the vendee; who is, in turn, the trustee of the unpaid purchase money, for the vendor; and if they, or either of them, dies, even before the time for completing the contract, the heirs and personal representatives occupy the same attitude. *Muldrow's Executors &c. vs. Muldrow's Heirs &c.* 397.

See *Lunacy and Lunatics*, 3, 4.

VESTED RIGHTS.

See *Statutes*, 2.

VOID AND VOIDABLE.

1. An order extending the demise, in ejectment, made after the judgment and *ex parte*, is not merely voidable, but void. *Coghill's Heirs vs. Burriss*, 57.
2. The court of appeals will not decide whether a decree is void or not, in a case where a purchaser under it is no party. *Coger vs. Coger*, 271.
3. A lunatic makes a deed, and afterwards, when sane, conveys the same land to another grantee, though the first deed is not absolutely void, the subsequent grantee, because of the privity of contract between him and the lunatic, may avoid it. *Cates &c. vs. Woodson*, 454.

WARRANTY.

1. In the sale and assignment of a judgment, without recourse, there is no implied warranty that the judgment and proceedings are free of error. The purchaser runs that risk; and cannot, in case of a subsequent reversal of the judgment, recover back, or avoid payment of, the price paid, or stipulated for it, upon the ground of a failure of consideration. *Glass vs. Read*, 163.
 2. *Dicta*—in the sale of a note there is an implied warranty, that it is *genuine*—no forgery. But no warranty (where the assignment is without recourse) that the authority of an agent, by whom the note purports to have been executed, was good and sufficient. *Glass vs. Read*, 163
- See *Condition precedent*, 1 *Gift*, 2.

WASTE.

1. For common wear and tear, in the prudent, ordinary use of land, the occupant is not answerable. For waste and deterioration caused by gross neglect or mismanagement, he must account. *Williams vs. Rogers*, 376.

WIDOW.

See *Dower*.

WILLS.

1. Parol evidence is admissible to show that there is a latent ambiguity in a will, upon the face of which there is nothing apparently ambiguous—to explain the ambiguity. *Tudor vs. Terrel et al.* 49.
2. A testator devises to his wife, for life, certain slaves, described in the will by their fifteen names—two of the fifteen by the name of “Phillis.” It appears, by parol proof, that the testator had but fifteen slaves, and only one named “Phillis”—but had one, not named in the will, called *Philip*. The whole will together indicating that the testator intended that his wife should have all his slaves during her life, it is presumed that “Phillis” was inserted in the will, in one instance, when *Philip* was intended, and so held that Philip passed, under the devise, to the widow. *Tudor vs. Terrel et al.* 49.—But—
3. A devise not found in a will, cannot be established, or supplied, by parol proof, though it may appear ever so clearly, that it was the intention of the testator to have had such a clause inserted. *Tudor vs. Terrel et al.* 49.
4. A recital of circumstances tending to elucidate the intention of a testator and explain the ambiguity shown to exist in a will. *Tudor vs. Terrel et al.* 51.
5. The style and tenor of the whole will should be attended to, in deciding upon the power of the executors under a particular clause. *Muldrow's Heir's vs. Fox's Heir's &c.* 82.
6. The will was proved and admitted to record in the county court; and afterwards (without fault of the executor or clerk) was lost. Upon the trial of a writ of error brought to reverse the order establishing the will, a sworn copy being produced, this court dispensed with the production of the original, received proof of its due execution, and affirmed the decision of the county court. *Lane's Will*, 106.
7. To the general rule, that a married woman can not make a will, there are exceptions. In certain cases, and for certain purposes, her will is valid. But her will disposing of personalty, cannot be received in a court of law or equity, without previous probate. *Yates' Will*, 216.
8. The statute of wills, section 1, applies to land only—and the like statute of H. 8, has never been held to prevent a *feme covert* from devising land under a power of appointment. *Yates' Will*, 216.
9. Formerly, in England, probate of the will of a married woman was refused, if the husband objected: otherwise now. *Yates' Will*, 216.
10. Where the will of a *feme covert* is offered for record in the county court, it should appear, *prima facie*, that she had authority to make a will; and then the court, without undertaking to investigate the sufficiency of the authority, should admit proof of the due execution, and order the will (if proved) to be recorded—leaving it to other tribunals to decide upon its effects. But the order should be so limited as not to deprive the husband of his right to administer on such other estate of his wife, as was not subject to her disposal by will—of which administration should be granted to him. *Yates' Will*, 217.

WILLS—continued.

11. In England, if the husband dies intestate, as to a part only of his personality, a share of that part goes to the widow; though she takes a devise also. *Query*—whether it can be so, under the statute of this state. *Shaw's devisees vs. Shaw's administrator*, 343.
12. The *inadequacy* of a provision made for a widow, by the will of the husband, does not authorize a decree in her favor, for dower or distribution, unless she has duly renounced the provision made for her by the will. *Shaw's devisees vs. Shaw's administrator*, 343.
13. The filing of a bill by a widow, for dower &c. is not equivalent to a renunciation of the provisions of the will; the renunciation must be made in the mode, and within the time, required by the statute. *Shaw's devisees vs. Shaw's administrator*, 343.
14. A testator, by his will, emancipates a servant, and requires that his son, who is the principal devisee and executor, shall furnish him with food and raiment during life: by this will, properly construed, the emancipated servant is, under all circumstances, entitled to victuals and clothes suitable for one in his condition: not only when he is old and infirm, but while he is well able to support himself by his own industry. *Young vs. Slaughter*, 385.
15. An estate in land does not pass by *nuncupative* will. *Palmer vs. Palmer and others*, 390.
16. Case of a *nuncupative* will—witnesses competent at the time the will was made, but interested when it was offered for record—question upon the admissibility of the testimony. *Gill's Will*, 447.
17. A *nuncupative* will cannot be proved by one who, when called as a witness, is interested in its being established—though he did not acquire his interest till after the will was published.—If one who is entitled to a legacy under a will, dies, his heirs or devisees, whose portions will be enlarged by establishing it, are not competent to prove it—notwithstanding he whose will they are to prove, died first, and they, at the time it was made, were disinterested. *Gill's Will*, 449.
18. A bequest to a subscribing witness to a will, that cannot be proved without him, is void; and if he is entitled to a portion in case the will is rejected, so much of the portion as does not exceed the value of the bequest, is saved to him. *Act of '97*, § 9. *Query*—can this act be so construed as to embrace the witnesses to *nuncupative* wills? It does not apply to those who have no bequest in the will they are called to prove, but which they are otherwise interested in establishing. *Gill's Will*, 450.

See *Sales of Land*, 8. *Limitations*, 4. *Powers*, 5. *Dower*, 6.

WITNESS.

1. An obligor is a competent witness to prove that a replevin bond was only acknowledged before a private person, in a trial between the obligee, and an officer charged with a failure to return an execution founded on the bond. *Williams et al. vs. Hall*, 97.
2. A distributee may divest himself of interest, and become a competent witness, by releasing the executor. *Boon vs. Nelson's heirs*, 391.

WITNESS—continued.

3. Suit by an executor; plea of *payment*, and issue thereon: a distributee is a competent witness for the executor: for a judgment against him, upon that plea, would tend to show him accountable, not to exonerate him from liability to, the distributees; nor would it increase their liability to creditors of the decedent, as the the distributees are only accountable for what they have received. *Boon vs. Nelson's heirs*, 391.
4. An interested witness is not competent to prove that he had no interest when the facts to be established by him occurred. If he was then disinterested, but became interested afterwards by his own voluntary act, or the act of another, and is therefore not incompetent, it must be made to appear by testimony other than his own. *Gill's Will*, 449.
5. A nuncupative will cannot be proved by one who, when called as a witness, is interested in its being established—though he did not acquire his interest till after the will was published.—If one who is entitled to a legacy under a will, dies, his heirs or devisees, whose portions will be enlarged by establishing it, are not competent to prove it—notwithstanding he whose will they are to prove, died first, and they, at the time it was made, were disinterested. *Gill's Will*, 449.
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WORK AND LABOR.

See *Assumpsit*, 1, 2, 3.

WRIT OF ERROR.

1. A decree rendered upon constructive service of process, remains in force—although the defendants may have obtained an order to open it, filed answers &c.—until it is *set aside* by sentence of the court, *after the hearing* upon the matter of the answers;—and the pendency of a suit upon the answers so filed, cross bills, &c. will not prevent the prosecution of a writ of error, and reversal of the decree. *Davis' Heirs vs. Bentley*, 247.
2. Where there is a decree against several absent joint defendants, which they may open, or reverse—one cannot, by obtaining an order to open the decree and filing his separate answer, affect the right of the whole to their writ of error. *Davis' Heirs vs. Bentley*, 247.
3. Persons who do not appear, by the record, to have been parties in the court below, and do not show, by proof, that they are connected in interest as heirs, or otherwise, can maintain no writ of error, and one sued out in their names, will be quashed. *Stevens' heirs vs. Stevens' widow*, 423.

See *Jurisdiction*, 7.

WRIT OF RIGHT.

1. A writ of right abates by the death of *any* of the demandants. *Gaines vs. Conn's Heirs*, 232.
2. Surviving demandants in a writ of right, cannot have a judgment for *all* the land, when no right of survivorship appears by the record. Nor can any judgment be rendered in the action after an abatement as to one of several demandants, by his death, whether the whole right survive or not: for *the suit* abates, and none of the statutes authorizing revivers, apply to real actions. *Gaines vs. Conn's Heirs*, 233.

WRITINGS OBLIGATORY.

See Construction, 1. Bonds, 1. Release, 1.

12. 13. 14.

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